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Labor and the Origins of Civil Procedure

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A series of changes within civil procedure over the past few decades—including the rise of private arbitration, the accompanying decline of public adjudication, and the erection of barriers to class actions—have diminished the economic power of workers, consumers, and diffuse economic actors. This Article demonstrates that avoiding these economic consequences was a central goal of those who crafted American federal civil procedure in the first place. Driven to action by the procedural issues involved in labor injunction cases, leading procedural reformers behind the modern regime strove to make American federal civil procedure sensitive to questions of political economy and designed it to mitigate rather than reflect economic power imbalances. This Article connects their procedural reform efforts in the enactment of the Norris-LaGuardia Act of 1932 to the rise of the Federal Rules of Civil Procedure of 1938, and, in so doing, reveals the unexplored progressive economic foundations of federal civil procedure.

This history provides a platform for a more conceptual analysis about civil procedure and economic power. The Article embeds the Norris-LaGuardia Act's procedural provisions in the rise of the federal government's facilitation of the "countervailing power" of workers, and begins to articulate the procedural dimensions of economic empowerment. While countervailing power is typically thought of as being facilitated by substantive law, the Norris-LaGuardia Act demonstrates how civil procedure can facilitate the exercise of countervailing power by providing economically less-resourced parties with open hearings and structuring procedure to protect their ability to amass power through association. More broadly, and returning to present issues, this Article argues that the recent transformations in civil procedure both undermine the economic purposes that were central to the regime's rise and diminish the ability of diffuse economic actors to exercise countervailing power—threatening once-enduring procedural commitments.

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INTRODUCTION

Courts and legislatures have altered the landscape of American federal civil procedure significantly in the past few decades. They have introduced heightened pleading standards, erected barriers to class actions, and increasingly permitted consumer and worker claims to be removed from public adjudicatory processes to private arbitral fora.[1] These changes reflect and widen existing economic power imbalances, making it harder for less-resourced plaintiffs to access discovery and trial in economic disputes with corporate actors and to challenge corporate wrongdoing through the class action mechanism and public adjudication.[2] Together these changes raise concerns about the dimin-

[1] *See infra* Part IV.
[2] *See id.*

ished economic power of workers, consumers, and diffuse citizens attempting to challenge concentrated corporate power.

Civil procedure scholars in large part have focused on the democratic implications of these changes. They have extolled civil procedure's democratic commitment to easily accessible public adjudication, arguing that the Federal Rules of Civil Procedure of 1938 (Rules) "reshaped civil litigation to reflect core values of citizen access to the justice system and adjudication on the merits."[3] They have asserted that the "progressive aim" of the Rules was to ensure the public "enforcement of [ ] private rights."[4] And they have critiqued recent judicial and legislative changes that weaken public adjudication for deviating from those values and aims by imposing barriers to and shifting disputes away from public adjudication.[5] Scholars have asserted that, by allowing these changes, courts and legislatures forget or ignore that courts "are themselves democratic institutions" and that easily accessible public adjudication and class actions strengthen democracy.[6]

Scholars have also recognized the economic implications of these changes. They note the economic strength of the corporate parties

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[3] Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 3–4 (2010).

[4] Paul D. Carrington, *Protecting the Right of Citizens to Aggregate Small Claims Against Businesses*, 46 MICH. J.L. REFORM 537, 538 (2013).

[5] *E.g.*, *id.* at 540–43; Miller, *supra* note 3, at 71; Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 302 (2013); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 529–30 (1986); Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1651 (1981); Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 402 (1990).

[6] Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 88 (2011). Beyond the Rules, scholars turn to political and constitutional theory to argue for increased access to judicial process. *See, e.g.*, JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 172–201 (1985) (developing a dignitary theory of due process focused on the relationship between procedures and the preservation of human dignity and self-respect); Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 120–25 (1978) (developing a dignitary account of procedural due process in civil actions). They also reason about the kinds of equality that ought to be presumed in procedure. *See, e.g.*, William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1867–68 (2002) (identifying three types of procedural equality, including equipage equality, rule equality, and outcome equality). Finally, there is also a "social welfare" focus in procedure scholarship. *See, e.g.*, Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1164–225 (2001) (articulating an individual welfare conception of procedural justice); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 305–06 (2004) (outlining a theory of procedural justice based on adherence to the core principles of participation and accuracy).

pushing for and benefiting from these changes and compare their strength to that of the diffuse and relatively less-resourced parties challenging them.[7] Indeed, scholars who focus on how civil procedure is shaped by economic and social context have long appreciated how economic power disparities infuse procedure.[8] Owen Fiss, for example, has argued that aggregations of corporate power need to be countered by citizen-litigant power and that civil procedure should facilitate this process.[9]

But while many scholars have focused on economic power disparities, courts and other scholars have justified recent changes by touting their positive economic consequences, arguing that liberal pleading

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[7] *E.g.*, Carrington, *supra* note 4, at 539–41; Miller, *supra* note 3, at 14–15.

[8] These theorists think of civil procedure not only as a mechanism for dispute resolution by two parties but also as a democratic process by which persons and groups, embedded in particular social, political, and economic contexts, attempt to stake out rights and reorder institutions. *See, e.g.*, Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) (offering a theory of public adjudication as a process by which public values are defined and refined); Resnik, *supra* note 6, at 88 (exploring the dignity and equality based aspects of public adjudication and rights-making); Yamamoto, *supra* note 5, at 398–402 (describing how civil procedure theory has become attuned to social context and the relationship between procedure and group rights and public values). These theories took shape in part to account for *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), and the Civil Rights Era's restructuring of public education, transportation, housing, prisons, and the like through the use of the structural injunction, by which a judge—after an open and public hearing—reordered state bureaucracies to remedy constitutional violations. William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 965–66 (1989) (book review) (describing *Brown* as watershed litigation inspiring a theory of civil procedure as normative rather than neutral). *See generally* Fiss, *supra* note 8. These theorists question the procedure's neutrality, exploring how it is shaped by forces of social and economic power, and they link procedure to the "development and articulation of public values." Yamamoto, *supra* note 5, at 398–402.

[9] Fiss critiques individualistic theories that focus on the right of an individual to participate in proceedings because they "leave the individual at the mercy of large aggregations of power," and includes the corporation and state bureaucracies in his model of such large aggregations. Fiss, *supra* note 8, at 43. Civil procedure scholars have also long focused on economic disparities that influence the ability of the poor to litigate. *E.g.*, Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401, 1420–21 (1995) (reviewing MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973 (1993)); Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 FORDHAM URB. L.J. 1325, 1329–31 (2007); John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 589–90 (1984). These projects are often connected to the efforts of reformers to secure more due process rights for welfare claimants in the 1960s and 1970s. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (establishing that welfare benefits are a property entitlement and that due process requires a pre-termination hearing for them to be withdrawn); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965) (exploring the disadvantages the poor face in protecting social welfare rights and arguing for greater legal protection); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (arguing for a property right in government benefits that would afford citizens adequate due process upon taking away, for example, welfare benefits).

standards and unwieldy class actions waste judicial resources, impose time and resource costs on defendants, and threaten business interests. In their view, private arbitration, heightened pleading standards, and a cabined class action mechanism minimize these costs.[10] These analyses tend to underemphasize or ignore economic power imbalances, and highlight the commitment of American federal civil procedure to efficiency, inexpensive adjudication (as reflected in Rule 1), and neutrality between parties.[11] Under these accounts, the logic and history of the Rules offer little in the way of approaching questions of economic power.

Scholars focusing on economic power imbalances, however, have more resources in their arsenal than they think. This Article shows how leading framers of the modern regime of civil procedure purposefully strove to design it to avoid the very economic consequences that recent changes reintroduce. One of their central aims was ensuring that procedural rules did not reflect and magnify the economic power imbalances immanent in industrial capitalism. During the New Deal birth of the modern regime of federal civil procedure, as the federal government asserted increasing control over the procedures of federal district courts in civil matters, questions about the relationship between civil procedure and economic power preoccupied many of the lawyers, law professors, judges, and congressional leaders involved in crafting the regime.

This Article reveals the progressive economic foundations of civil procedure, illuminating the views of some of the leading political and legal forces behind the enactment of the Rules. Their views had been forged largely in the context of litigation around labor disputes. While it is widely recognized that New Deal policymakers empowered workers through substantive law such as labor law,[12] this Article shows that, in addition to and preceding such laws, policymakers facilitated the power of workers through reforming procedure related to labor disputes. They did so, first, by reforming the procedures used by

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10 *See generally infra* Part IV.

11 *See, e.g.*, Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 748 (1981) (Burger, C.J., dissenting) (describing arbitration as a "swift, fair, and inexpensive remedy"); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 677–78 (1996) (describing the view that arbitration is better for *all* parties because it is "quicker, cheaper, and more final than litigation").

12 Prominent examples include the National Labor Relations Act, which provided workers with a right to bargain collectively, and the Fair Labor Standards Act, which provided for a federal minimum wage and banned child labor in interstate commerce, among other things. *See* National Labor Relations Act, Pub. L. No. 64-198, 49 Stat. 449 (1936) (codified at 29 U.S.C. §§ 151–169 (2012)); Fair Labor Standards Act, Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219).

federal district judges in issuing labor injunctions, and later, through the Rules themselves. This Article thus recovers the neglected procedural dimensions of economic empowerment.

At the heart of these legal struggles was the relationship between civil procedure and power imbalances between employers and employees. Before the advent of the modern regime of federal civil procedure, federal district courts issuing labor injunctions often did so based on the skeletal complaints of employers, denying workers a right to be heard in open court about the lawful nature of their association and broadly enjoining workers from associating without following familiar procedural safeguards.[13] At a time when corporate power was consolidating and individual worker bargaining power was weak, these procedures had devastating effects on workers attempting to unionize or engage in concerted activity. Both progressive and conservative legal commentators critiqued these procedures and argued that the denial of public hearings and absence of procedures protecting worker aggregation power undermined the legitimacy of civil procedure and the courts wielding it, and reified and widened existing power imbalances.[14]

Congress responded by passing the Norris-LaGuardia Act (NLGA) in 1932.[15] Through the NLGA, the federal government asserted increased control over the procedures of federal district courts issuing injunctions in labor disputes. The statute afforded parties stronger rights to be heard in open court and put in place stronger procedural safeguards against enjoining lawful worker association. Today the statute remains part of the architecture of American federal civil procedure. It is typically an object of study for labor law scholars because of its general commitment to worker freedom of association, including its substantive provisions banning "yellow-dog" contracts, which prohibited employees from joining unions or forced them to join company-based unions.[16] The NLGA has been relatively sidelined by scholars of civil procedure.

I argue that the enactment of the NLGA was a significant moment in the history of the rise of American federal civil procedure. The NLGA was brought to life on the heels of the nation's first robust

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13 *See infra* Section I.B.

14 *See infra* Section I.D.

15 Norris-LaGuardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115).

16 *See generally, e.g.*, WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991); WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937 (1994); CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960 (1985).

discourse about what this Article calls "procedural political economy." Reformers, that is, focused on the political-economy relationship between procedural rules as democratic commitments and the economic ordering they shape and by which they are shaped. They considered the ways in which procedural rules influence distributions of economic power and are influenced by economic forces. These views shaped the procedural design choices in the NLGA. The enactment of the NLGA was part of the assumption of control by the federal government over procedure in order to ensure open hearings for workers and to structure procedure to be accessible to structurally disadvantaged economic parties. It was part of the process of procedural state-building[17] in which scholars ought to contextualize the rise of modern federal civil procedure. Thus, although the NLGA is often conceived of as "closing" courts because it defined and limited the procedures of federal district courts and removed certain cases from courts' jurisdiction,[18] this Article places the NLGA in a larger struggle for open and accessible courts that came to fruition in the enactment of the Rules.

Sidelining the NLGA, civil procedure scholars instead focus on the Rules Enabling Act of 1934 (Enabling Act),[19] which granted the Supreme Court authority to draft federal rules of civil procedure, and the Rules themselves,[20] which emanated from that grant and expressed a commitment to trans-substantive rules of civil procedure. But to sideline the NLGA is to ignore a rich resource for understanding the history of civil procedure, including the Enabling Act and the Rules. For one thing, the labor injunction and the NLGA are more connected to the rise of the Rules than existing accounts recognize. The labor injunction and the NLGA—and the procedural political economy discourse they began—had a significant influence on the forces behind the Rules.

This Article explores how leading forces behind the Rules were motivated to move towards a uniform system of rules of civil proce-

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17 *See* Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1275–77 (1997) (exploring the New Deal commitment to extending the control of the federal government over procedure in a more centralized manner); *cf.* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 4, 10 (1982) (arguing that state-building in the U.S., such as the development of a national administrative apparatus, was largely done in response to industrialism).

18 *See, e.g.*, Ralph K. Winter, Jr., Comment, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 YALE L.J. 70, 71–76 (1960) (exploring how the NLGA enacted "profound changes" that reduced the power of federal courts in labor disputes).

19 28 U.S.C. § 2072 (2012).

20 FED. R. CIV. P.

dure in part by the lack of uniformity of labor injunction procedures. The ways in which varying labor injunction procedures reflected and magnified economic power imbalances influenced procedural reformers behind the Rules, from intellectual lawyer-leaders like Felix Frankfurter and William Howard Taft, to drafters like Charles Clark, to political leaders such as Attorney General Homer Cummings, who shepherded the Rules through Congress.[21] Scholars have considered the views of all of these actors in interpreting the purposes and theory of the Rules,[22] and this Article deepens the understanding of their economic views.

The labor injunction and labor issues also had a starring role in the legislative history of the Rules, taking center stage in congressional discussions as Senate and House committees decided whether or not to accept the draft Rules delivered to them by the Supreme Court in 1938.[23] Their consideration of the draft Rules was suffused with an awareness of power imbalances that had been widened by civil procedure and concern over ensuring that the Rules would not reinstitute them and would instead respect the NLGA's solution of intervening to facilitate the power of workers.[24] Since there was little legislative discussion around the passage of the Enabling Act in 1934, the relatively more robust discussions around the draft Rules in 1938 provide a window into the concerns of legislative leaders. Indeed, one scholar has noted in passing that congressional leaders focused on labor issues and injunctions.[25] This Article recovers these discussions more fully because they illuminate the background economic purposes of the Rules and the concerns of their progenitors.[26] By unearthing this history, this Article shows how the changes of the past few decades are not only vulnerable to the normative critique to which scholars subject them, but can also be critiqued as deviating from the purposes of the Rules.[27]

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21 *See infra* Section I.D.

22 *See, e.g.*, Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1069–95 (1982) (exploring the roles of Cummings and Taft); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 943–74 (1987) (discussing the role of Clark, Taft, and ABA reformers).

23 *See infra* Section III.B.

24 *See infra* notes 271–84 and accompanying text.

25 Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 742 (1998).

26 Indeed, with this discourse in mind, Rule 1's commitment to "just, speedy, and inexpensive determination of every action and proceeding" may reflect how these leaders viewed the *in*justice of labor injunction procedure generally. FED. R. CIV. P. 1.

27 This is not to deny that the Rules have changed since 1938, or even to mark this moment, albeit a foundational one, as more important interpretively. Instead, this Article

In addition to the persuasive power of this history, the NLGA and its influence on the Rules provide a useful example of countervailing power in a procedural context.[28] The leaders behind the NLGA were influenced by institutional economic theories about the problems that arose from concentrated corporate power and weak worker bargaining power, both of which civil procedure was entrenching.[29] The NLGA's solution, as one prominent economist later put it, was to facilitate the "countervailing power" of workers to combat excessive corporate power and strengthen worker bargaining power.[30]

This Article begins to explore what the concept of countervailing power can add to civil procedure. Countervailing power is a mechanism through which diffuse workers and consumers aggregate their power to restrain and counterbalance the power of corporate actors whose concentrated power makes individual efforts at bargaining or resolving conflicts less efficacious.[31] They do so by sharing information and amassing power collectively, often through association; two core features are therefore publicity and aggregation.[32] The concept is typically thought of as a creature of substantive law, encompassing, for example, labor laws strengthening the rights of diffuse workers to

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provides historical resources immanent in the structure and rise of American civil procedure that bolster the arguments of those who are concerned with issues of procedural political economy today.

28 The concept of countervailing power has not been fully explored in civil procedure scholarship, although Owen Fiss uses the phrase in passing, explicitly referencing the need for citizens to countervail both concentrated corporate and state power. *See* Fiss, *supra* note 8, at 44 ("[W]hat is needed to protect the individual is the establishment of power centers equal in strength and equal in resources to the dominant social actors; what is needed is countervailing power."). Fiss, however, is focused on citizens exercising countervailing power against state bureaucracies and does not explain how the concept would function with regard to economic power, nor does he reference institutional economic theory. *See id.* at 19–20 (describing the need for countervailing power in public contexts, such as school desegregation lawsuits or prison conditions litigation).

29 *See infra* Section I.D. Institutional economists seek "to understand the social institutions that condition economic life." BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 5 (2009); *see also* Walton H. Hamilton, *The Institutional Approach to Economic Theory*, 9 AM. ECON. REV. 309, 311 (1919) (defining "institutional economics" as a field that aims to describe the nature of economic ordering and its relationship to human wellbeing).

30 *See* JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (rev. ed. 1956) (exploring how New Deal legislation, including the NLGA, facilitates the ability of workers and consumers to aggregate power and to counterbalance the power residing within concentrated industries); *see also infra* Section I.A.3 (discussing the concept of countervailing power in greater depth).

31 *See id.*

32 *See id.*

aggregate power.[33] But the history of the labor injunction shows how economic power imbalances of the kind countervailing power is meant to correct can also be maintained or exacerbated procedurally, both when judges design procedures to deny workers a right to be heard in open court (publicity) and when judges use procedure to enjoin their efforts to amass power through association (aggregation).[34]

The NLGA, in turn, shows how procedural provisions ensuring and protecting publicity and aggregation are instruments of countervailing power.[35] With regard to publicity, the right of parties to be heard in open court means that the claims of even an individual plaintiff can reach out to and educate the public, potentially inspiring workers, consumers, and citizens generally to join together to exercise countervailing power. With regard to aggregation, the ability of consumers and workers to combine resources, whether in a union or a class action, increases their ability to exercise countervailing power.

This Article explores how the concept of countervailing power can be elaborated in civil procedure generally, beyond the four corners of the NLGA. In an era when courts and legislatures have raised barriers to public adjudication and class action, I argue that public adjudication as an instrument of publicity and class action as an instrument of worker and consumer aggregation can facilitate the exercise of countervailing power. Taking the history and theory together, I therefore conclude that the Supreme Court's recent turns in its arbitration and class action jurisprudence both depart from the background sensitivity to questions of economic power that once characterized American federal civil procedure and diminish the ability of diffuse workers, consumers, and economic actors to exercise countervailing power.

This Article proceeds in four Parts. Part I revisits the origins of civil procedure. It begins with the economic context in which labor injunction procedure operated and outlines the relationship between procedure and that context. It then shows how the practices of courts issuing labor injunctions teed up the problem of civil procedure cementing and widening economic power imbalances. Part II describes how these issues were resolved in the NLGA, and Part III shows how the NLGA and its labor-interventionist goals stayed at the center of the dialogue that produced the Rules. Part IV turns to

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[33] *See, e.g.*, Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 234 (2015) (noting that unions were once "lauded as a source of 'countervailing power' against powerful corporations").

[34] *See infra* Section I.B (describing labor injunction procedure).

[35] *See infra* Sections II.A, II.B (discussing the purpose and function of the NLGA).

modern problems in procedure and analyzes them through the lens of the history and theory that this Article has presented.

Ultimately, this Article explores the origins of civil procedure through the struggles around the labor injunction in order to show how legal participants once confronted the problem of economic power imbalances through procedure. It then applies and extends their logic to critique the shifts of the past few decades.

I
THE RISE AND FALL OF THE LABOR INJUNCTION

This Part reconstructs the rise and fall of the labor injunction through the lens of civil procedure. Section I.A begins with an overview of how the legal struggles around the labor injunction sparked a focus on procedural political economy. Section I.B then turns to the procedural struggles of the progressive and New Deal eras, assessing the procedures of courts issuing labor injunctions and how they deviated from familiar principles of equity. Section I.C explores the unsuccessful efforts to reform these procedures in the Clayton Act of 1917. Finally, Section I.D overviews the legal discourse that developed among progressive and conservative lawyers, law professors, judges, and congressional leaders who critiqued the procedures of judges issuing labor injunctions and would lead the path to reform.

A. Procedural Political Economy

Civil procedure both shapes and is shaped by economic context. The legal struggles at the foundations of the rise of modern federal civil procedure took place within and helped to shape power distributions between firms and workers within a dramatically changing economic context as the country industrialized.[36]

The labor injunction, which came to prominence in the early days of the twentieth century, was the procedural vehicle for this discourse. Reformers critiqued the procedures of district courts issuing labor injunctions for three decades before the NLGA was passed.[37] Reformers came to see how procedure interacted with a context in which worker power was relatively weak and corporate power was relatively concentrated. The procedural political economy discourse focused on how procedure interacted with this economic structure,

[36] *See* FORBATH, *supra* note 16, at 21 (exploring how the rise of industrialism fueled the rise of the modern labor movement). *See generally* SKOWRONEK, *supra* note 17 (tying the growth of the American state to the rise of industrialism).

[37] *See infra* Section I.D.

and in some ways, kept the power imbalances that characterized it in place.[38]

Thus, before turning to the struggles over the labor injunction in more detail, I explore in the following two subsections (1) the development of an economic structure that left institutional economists and legal reformers worried about disadvantaged workers and (2) briefly sketch out how civil procedure interacted with and maintained this structural disadvantage. In terms of economic structure, I focus on how lawyers, legislative reformers, and economists were concerned about corporate power and concentration within industries on one side and the weakness of worker bargaining power on the other. I then turn to civil procedure and explore how their concerns about the power disparity between corporations and labor influenced their critiques of existing procedure as strengthening the hand of the already-stronger party.[39] They understood that workers were unable to bargain effectively as individuals under conditions of consolidated corporate power and sought to associate in unions to bargain more effectively. And they saw how employers turned to federal courts, and—with minimal showing and without giving workers an adequate right to be heard—obtained injunctions enjoining workers from associating in ways that were necessary under prevailing economic conditions. This was the problem of procedural political economy that they identified.

Finally, in the third subsection, I explore how the development of this economic structure sparked a demand from reformers for government intervention into markets through lawmaking to level the economic playing field by facilitating the exercise of countervailing power by workers. I also explore how procedural reform came to the center of this project.

1. Corporate Concentration

For institutional economists, the rise of corporate concentration within industries—with often a few firms controlling much of the market share—was a troubling aspect of industrial development in the

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[38] *See id.*

[39] Writing in 1931 to garner approval for the enactment of the NLGA, Frankfurter and Greene also outlined how these changes provided a different view of the market than that advanced by classical liberal economic theory. As they put it, "the social and economic considerations that inspired the proposed Act" led Congress to reject the classical notion of freedom of contract that presumes relatively equal bargaining power between employers and employees. *Id.* at 389. That "abstraction drawn from early nineteenth-century individualism" needed to be "cloth[ed] . . . with the concrete realities of modern large-scale industry," including growing corporate consolidation of power and the difficulties workers faced in bargaining with such large corporate enterprises. *Id.*

country and one that required governmental intervention. Indeed, it was significant because it challenged assumptions underlying classical liberal economic theory that justified governmental non-intervention in the economy. Classical liberal economic theory justified state non-intervention into market arrangements on premises about broad competition: Various firms and actors competed in a manner that removed excess wage and price control from their purview and subjected it to competitive market forces.[40] But institutional economists, including those who advised on and mentored the drafters of the NLGA,[41] showed that across a swath of American industries the model did not work this way because competition was eroded by corporate concentration.[42] Within many industries, a few firms had come "to be of unprecedented size and power."[43]

These findings about corporate concentration challenged the "theory of capitalism based on the notion that markets were shared by

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[40] Under this model, "no buyer or seller is large enough to control or exercise an appreciable influence on the common price." GALBRAITH, *supra* note 30, at 14; *see also* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 16 (2d ed. 1982) (articulating a view of "economic freedom" based on competition and exchange that counsels for a limited role for government intervention into market arrangements); FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 43 (1944) (arguing that broad-based competition makes market ordering superior to forms of centralized planning); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan ed., Univ. Chicago Press 1976) (1776) (envisioning broad competition that makes the owners of resources use them most productively). Competition was presumed to be "efficient," making producers "adopt the most efficient mode and scale of operations and driving out the inefficient and incompetent," and along the way establishing a fair market price for both wages and goods. GALBRAITH, *supra* note 30, at 66.

[41] Edwin Witte, for example, had been mentored by John Commons, a pioneer of institutional economics, at the University of Wisconsin. *See* David B. Johnson, *The "Government Man": Edwin W. Witte of the University of Wisconsin*, 82 WIS. MAG. HIST. 32, 36 (1998) (noting that Commons had a "profound effect" on Witte).

[42] *See, e.g.*, ARTHUR ROBERT BURNS, THE DECLINE OF COMPETITION: A STUDY OF THE EVOLUTION OF AMERICAN INDUSTRY (1936) (surveying the decline of competition and the rise of large firms concentrated within industries in the lead up to the New Deal); GALBRAITH, *supra* note 30 (same); WALTON H. HAMILTON, THE PATTERN OF COMPETITION (1940) (exploring the growth of large firms and how the evolving economic structure distorted bargaining power between those firms and citizens); ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE (1966) (exploring how New Deal reformers came to view monopoly, competition, and market ordering, and to rethink the government's role in making markets more competitive).

[43] Walton H. Hamilton, *The Problem of Anti-Trust Reform*, 32 COLUM. L. REV. 173, 174 (1932). Economists showed that the degree of concentration was such that "a small number of large corporations are responsible for a very substantial proportion of all industrial activity" in many industries. GALBRAITH, *supra* note 30, at 38; *see also* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 43–46 (2012) (arguing that corporate interests are aligned with concentrated, and therefore inefficient, markets).

many producers no one of them large enough to influence the common prices paid or received."[44] Institutional economists therefore showed that oligopolistic power was exercised by firms across the economy, and that the private decisions of these concentrated actors were impacting the price of products and wages of workers, which in turn influenced the welfare of the state's citizens.[45] These economists believed that captains of industry could exacerbate income inequality by raising prices and lowering wages, destroying the forms of social welfare that markets were thought to promise. Indeed, concentrated corporate power that went unchallenged could bleed into political power, raising the specter of oligarchy.[46]

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[44] GALBRAITH, *supra* note 30, at 40; *see also* Hamilton, *supra* note 43, at 174 (describing the popular idea of efficiency through self-regulation). As John Kenneth Galbraith put it, summarizing a point that permeated progressive era institutional economic thought, if there are a small number of powerful firms in a typical industry, which recognize their power and interdependence, then "privately exercised economic power is less the exception than the rule in the economy. It is also of a piece with the power anciently associated with monopoly." GALBRAITH, *supra* note 30, at 50. For a survey of corporate concentration during the New Deal era, see U.S. NAT'L RES. COMM., THE STRUCTURE OF THE AMERICAN ECONOMY (1939).

[45] *See, e.g.*, Walton H. Hamilton, *The Control of Big Business*, THE NATION, May 25, 1932, at 592 ("If the farmer found difficulty in making ends meet, or the small merchant was threatened with extinction, or the customer had his pocket picked by the extortionate dealer, or the workingman put in his long hours for a pittance, it was all because the system of free competition was not working."); *see also* GALBRAITH, *supra* note 30, at 51 (exploring how concentration negatively affected wages and prices).

[46] *See* GALBRAITH, *supra* note 30, at 109 (considering how concentrated firms may turn their "vast resources to corrupting politics and controlling access to public opinion"); *see also* WILLIAM J. BAUMOL ET AL., GOOD CAPITALISM, BAD CAPITALISM, AND THE ECONOMICS OF GROWTH AND PROSPERITY 71–79 (2007) (outlining the conditions of, and problems with, oligarchic capitalism). Joseph Fishkin and William Forbath show in a wide-ranging study how the threat of oligarchy has been a central concern in American thought, even taking on constitutional dimensions. As they put it: "The constitutional problem of oligarchy is the danger that concentrations of economic power and political power may be mutually reinforcing—and that because of this, sufficiently extreme concentrations of power may threaten the Constitution's democratic foundations." Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 671 (2014) [hereinafter Fishkin & Forbath, *The Anti-Oligarchy Constitution*]; *see also* LOUIS D. BRANDEIS, THE CURSE OF BIGNESS 72–74 (Osmond K. Fraenkel ed., 1934) (arguing that large firms threaten democracy); Joseph Fishkin & William E. Forbath, *The Great Society and the Constitution of Opportunity*, 62 DRAKE L. REV. 1017, 1049–54 (2014) (outlining how economic conditions and regulatory failures make oligarchy a concern today) [hereinafter Fishkin & Forbath, *The Great Society*].

The threat of oligarchy was a core concern during the progressive and New Deal era struggles that are overviewed in this Article. *See, e.g.*, Franklin D. Roosevelt, Acceptance of the Renomination for the Presidency (June 27, 1936), *reprinted in* 5 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 230, 231–34 (Samuel I. Rosenman ed., 1938) ("For too many of us the political equality we once had won was meaningless in the face of economic inequality. A small group had concentrated into their own hands an almost complete control over other people's property, other people's money, other people's labor—other people's lives.").

The effects of corporate concentration and the potential for continued growth of corporate power only heightened the importance of countering concentrated corporate power with worker power. These economic conditions provided a role for the state in ensuring that workers, individually inefficacious at bargaining, could aggregate their power through association. To that end, they made judicial procedure that interfered with worker association, and in particular, labor injunction procedure, a cause for concern.

2. *Bargaining Power*

The very rise of industrial capitalism also had some institutional economists concerned with worker bargaining power and social welfare. Progressive economists asserted that "vastly unequal" bargaining power between employers and employees undermined the norm of state non-intervention in the economy, either apart from corporate concentration levels or in combination with them.[47] Perhaps most incisive among them was Robert Hale. Hale articulated how the government was complicit in creating unequal bargaining conditions through legally constructing the market.[48] Under his account, the state aided the development of corporate power and protected it through property and contract law, which provided owners with title to the products that laborers worked to produce and required workers to both sell their labor for wages and to purchase the products made through such arrangements for consumption and subsistence.[49] This structure diminished the relative freedom of workers who needed to sell their labor in bargaining transactions with employers. Because the state had "intervene[d]" on behalf of corporations, augmenting the property

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[47] *See* Morton J. Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1829 (1987) (exploring how progressives such as Morris Cohen, Robert Hale, and Roscoe Pound focused on imbalanced market and bargaining power to undermine the notion of state non-intervention).

[48] *See* ROBERT L. HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER (1952) (exploring both the government's role in creating the market and conditions of mutual coercion and its interest in counterbalancing the imbalances it created); Robert L. Hale, *Political and Economic Review*, 8 A.B.A. J. 752, 752–53 (1922) (discussing the government's role in making slavery economically feasible); *see also* FRIED, *supra* note 29 (expounding Hale's view); Warren J. Samuels, *The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261, 263 (1973) (analyzing, among other things, how Hale's writing focused on "the structure and diffusion of the distribution of power, the role of the state in determining and changing the structure of private economic power, and the question, to which (or whose) interests should the state be responsive").

[49] *E.g.*, Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 603–05 (1943).

and contract rights of firms, Hale viewed it as not only reasonable but necessary for the state to intervene on behalf of workers as well.[50]

For Hale, the state is thus constitutive of economic life from the outset, and any notion of non-intervention at a given point misses how intervention is pervasive, and in particular how the law has been structured to give employers a series of legal advantages that workers lack.[51] The premises of classical liberty of contract analysis therefore miss the distortion of bargaining power from the outset, which systematically undermines the relative liberty of workers in a system of industrial or managerial capitalism. The market value of labor may merely "reflect[ ] the low degree of compulsion [workers] can bring to the bargaining process, as compared to the compulsion brought to bear by the employer."[52] And precisely because "the law endows [employers] with rights that are more advantageous than those with which it endows [workers]," bargaining does not approximate anything like the supposed ideal of freedom of contract, and the government is justified in intervening to rebalance the scales for workers.[53]

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[50] HALE, *supra* note 48, at 533. To my knowledge, Hale's insights, like Galbraith's, have never been fully fleshed out in the field of civil procedure, although legal realists, often drawing on Hale, later "blurred the clean divide between substance and procedure" that was presumed by some of the creators of the Rules. Yamamoto, *supra* note 5, at 386.

[51] Hale, *supra* note 49. As he explained, employers acquire title to products under the legal regime created by the state even though laborers contributed to their production because laborers have "waived their claims to any share in the ownership of the [product]" through "a series of bargaining transactions." *Id.* at 605. However, laborers' freedom not to sell their labor for a wage is also constrained by the protections the government has given to producers: The government has protected market arrangements such that a laborer must pay to consume the goods needed to live beyond what she or he can produce, and if the laborer does not have the money to consume what she or he needs to live, the laborer must work. *Id. See generally* Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894) (offering an account of how power relationships influence contract and bargaining). In this way and others, the actions of the government have unequally distributed power among market participants, sacrificing the relative freedom of the employee and shifting it to the employer. *See, e.g.*, William E. Forbath, *The Distributive Constitution and Workers' Rights*, 72 OHIO ST. L.J. 1115, 1132 (2011) (describing how legal realists recognized the "public, legally constructed character of private economic power"); Louis M. Greeley, *The Changing Attitude of the Courts Toward Social Legislation*, 5 ILL. L. REV. 222, 223 (1910) (arguing that the "theoretic freedom of contract . . . has no existence in fact" and that the state, by alluding to it, fails to positively intervene to protect workers); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1426 (1982) (exploring how progressive thinkers showed how law created market arrangements and how the notion of an invisible hand was misguided).

[52] Hale, *supra* note 49, at 627.

[53] *Id.* at 628; *see also* JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 62 (1927) ("[L]abor legislation is justified against the charge that it violates liberty of contract on the ground that the economic resources of the parties to the arrangement are so disparate that the conditions of a genuine contract are absent; state [action] is introduced to form a level on which bargaining takes place."); RICHARD T. ELY, STUDIES IN THE EVOLUTION OF INDUSTRIAL SOCIETY 406 (1903) ("The coercion of economic forces is largely due to the

The point that the leaders behind labor injunction reform made, however, was that government—in this case, federal judges—did the opposite instead, balancing the scales against workers. They fashioned procedures that thwarted workers' efforts to aggregate their power, keeping intact a structural imbalance. Procedure interfered with worker association efforts, as courts swiftly enjoined attempts to unionize and strike, often crediting skeletal pleadings to find that worker associations were criminal or threatened irreparable harm.[54] These procedures posed a problem for progressive economists and commentators generally concerned with weak worker bargaining power.

3. *Countervailing Power*

The problems of corporate concentration and weak worker bargaining power shaped the views of reformers about federal intervention into the economy. With regard to procedural reform, these problems formed the economic context in which labor injunction procedure operated and shaped the discourse around how procedure interacted with distributions of economic power and how it should be altered. Reformers understood that if procedure could entrench economic power disparities, it could also dis-entrench them.

As the Parts below show, the larger New Deal response to these economic problems—of which the NLGA was a part—was to facilitate the ability of economically diffuse and disadvantaged workers to exercise "countervailing power."[55] This facilitation, as I argue below, was achieved through both substantive and procedural reforms. In this Section, I briefly define the concept of countervailing power, as it is central to understanding the history below and the theory of the reform that ensued. I then turn to sketching out how the concept has procedural dimensions that the history of the labor injunction helps to tease out.

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unequal strength of those who make a contract, for back of contract lies inequality in strength of those who form the contract. Contract does not change existing inequalities and forces, but is simply the medium through which they find expression.").

[54] *See infra* Section I.B.

[55] GALBRAITH, *supra* note 30, at 113. For accounts of how progressives viewed positive government intervention, see, for example, T.H. Green, *Liberal Legislation and Freedom of Contract*, *in* LIBERTY (David Miller ed., 1991), which discusses individuality and state interference, RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 5–6, 227, 240, 254 (1955), which explores the link between progressivism and economic individualism, and GEORGE E. MOWRY, THE ERA OF THEODORE ROOSEVELT 1900–1912, at 41–42, 81–82 (1958), which discusses the interventionist objectives of the progressive movement.

Countervailing power is a mechanism through which diffuse individuals who are subject to concentrated corporate power and possess weak individual bargaining power—such as workers, consumers, or farmers—join together into concentrated units to employ "restraint on the private exercise of economic power."[56] Countervailing power can therefore be exercised by workers and consumers who band together through trade unions or consumer associations to counteract the power of concentrated firms and increase their own bargaining power. The term was developed in 1952 by institutional economist John Kenneth Galbraith, who coined it to explain the state's intervention into the economy on behalf of diffuse and economically disadvantaged parties through New Deal legislation, and included the NLGA in his examples of state facilitation of countervailing power.[57]

Countervailing power is a structural solution for sharing power: Actors who are disadvantaged because they are diffuse and must reckon with concentrated corporate power pool their resources to bargain more equitably and share power. Thus, as Galbraith explains, while concentrated power once meant that steel industry workers worked twelve-hour days six days a week, the labor union exercised

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[56] GALBRAITH, *supra* note 30, at 110. *See generally* Walter Adams, *Competition, Monopoly and Countervailing Power*, 67 Q.J. ECON. 469 (1953) (exploring how diffuse economic actors must counter concentrated economic power). Galbraith's theory overlaps with that of Berle and Means, which critiques the assumptions of classical economic theory under conditions of corporate concentration and advocates the "development of social pressure" as a counterweight to concentrated corporate power to demand that the power of the corporation be used for "the benefit of all concerned"—from shareholders, to employees, to consumers, to the larger community. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 352–57 (1933).

[57] *See* GALBRAITH, *supra* note 30, at 111 ("It will be convenient to have a name for this counterpart of competition and I shall call it *countervailing power*."). Other economists made similar arguments using somewhat different language. *See, e.g.*, WILLIAM FELLNER, COMPETITION AMONG THE FEW: OLIGOPOLY AND SIMILAR MARKET STRUCTURES 17–23 (1949) (outlining a theory of oligopoly that included corporate concentration). The theory has also been extended beyond Galbraith's context. *See, e.g.*, Spencer Weber Waller, *The Modern Antitrust Relevance of Oliver Wendell Holmes*, 59 BROOK. L. REV. 1443, 1444 (1994) (arguing that Holmes's writing, predating Galbraith's, formed a theory of countervailing power with respect to antitrust legislation); Barbara Ann White, *Countervailing Power—Different Rules for Different Markets? Conduct and Context in Antitrust Law and Economics*, 41 DUKE L.J. 1045 (1992) (applying the theory of countervailing power to antitrust law). While Galbraith was focused more on corporate concentration than on bargaining disparities, his solution of workers and consumers neutralizing or curbing corporate power extends to bargaining theories, and Galbraith himself was influenced in developing it by progressive bargaining theorists such as Richard T. Ely and John Commons. *See* BENJAMIN G. RADER, THE ACADEMIC MIND AND REFORM: THE INFLUENCE OF RICHARD T. ELY IN AMERICAN LIFE 53 (1966) (discussing Ely's influence on Galbraith); JAMES RONALD STANFIELD & JACQUELINE BLOOM STANFIELD, JOHN KENNETH GALBRAITH 31 (2011) (discussing Commons's influence); *see generally* RICHARD PARKER, JOHN KENNETH GALBRAITH: HIS LIFE, HIS POLITICS, HIS ECONOMICS 36–37 (2005) (discussing Galbraith's early development).

countervailing power to neutralize the industry's economic advantage and bargain for better hours.[58] By bargaining collectively, workers who exercise countervailing power also receive more of the profits that those large firms acquire.[59]

Galbraith's interest in countervailing power stemmed from his concern with corporate concentration levels, a concern well-rooted in the institutional literature. But economists concerned more squarely with bargaining disparities also advocated for a version of the mechanism, even if they did not use the term. For example, though focused more on bargaining than corporate concentration, economists such as Hale sought to "counterbalance" worker power against "the force of concentrated capital" through positive government intervention.[60] The notion was that workers could countervail concentrated corporate power if the state aided them, "equalizing the coercive power to which private parties were subject" and "tilt[ing] the balance of power more towards labor."[61] They envisioned the state taking a positive role in facilitating the bargaining power, and therefore the relative freedom, of diverse citizens and consumers—and principally, in the New Deal model, workers.

The role for state facilitation of countervailing power arises because citizens may not be effective in summoning collective power on their own. Galbraith notes that during the New Deal, supporting countervailing power became a significant function of government. For example, workers "sought and received . . . protection and assistance" for their efforts to bargain collectively.[62] The state's interest in intervention in these ostensibly private decisions "becomes strong

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[58] GALBRAITH, *supra* note 30, at 114–15; *see also* Marc Schneiberg & Tim Bartley, *Organizations, Regulation, and Economic Behavior: Regulatory Dynamics and Forms from the Nineteenth to Twenty-First Century*, 4 ANN. REV. L. & SOC. SCI. 31 (2008) (outlining regulatory policies that countervail concentrated corporate power).

[59] GALBRAITH, *supra* note 30, at 115. But Galbraith noted that this mechanism might work differently depending on demand and market forces, and may have differing inflationary effects. *Id.* at 116 (acknowledging how outside forces may affect the relationship).

[60] FRIED, *supra* note 29, at 47.

[61] *Id.* at 68.

[62] GALBRAITH, *supra* note 30, at 136. Galbraith is referring principally to the National Labor Relations Act of 1935. *See* National Labor Relations Act, Pub. L. No. 64-198, 49 Stat. 449 (1936) (codified at 29 U.S.C. §§ 151–169 (2012)) (encouraging collective bargaining). For an account of how facilitating countervailing power can actually decrease the need for more intrusive forms of state intervention, see HAWLEY, *supra* note 42, at 7–8, discussing how government intervention could democratize big business. Galbraith also references minimum wage and social insurance legislation. GALBRAITH, *supra* note 30, at 136. While he does not flesh out the role that these entitlements play, one can envision them as providing citizens with the minimum security that give them the freedom and strength to exercise countervailing power.

where it can be shown that countervailing power is not fully operative."[63]

Interestingly, while Galbraith counted the NLGA among his list of examples of state facilitation of countervailing power, he did not mention its procedural provisions or specify whether or not its procedural provisions bore upon the exercise of countervailing power. Doing so is largely the work of this Article. While countervailing power is typically conceptualized by scholars as being facilitated by substantive law, like labor legislation or the NLGA's general commitment to protecting worker association in unions, the history of the labor injunction and the NLGA illustrates how procedure can both thwart and facilitate the exercise of countervailing power.

Reformers focused on three norms—which I outline here and to which I will return throughout—in articulating the relationship between procedure and economic power and in articulating how procedural reform could facilitate the exercise of countervailing power. The first norm—the problem of economic power—is one I have already introduced, and it was articulated by reformers focused on how procedure interacted with concentrated economic power. As I explore in greater detail in Section II.D, legal actors, and ultimately Congress, recognized that civil procedure maintained and widened existing economic power imbalances created by corporate concentration and by bargaining disparities, and viewed this as a problem that required procedural reform. Reformers understood that the design of pre-New Deal procedure operated against the efforts of workers to join together to counterbalance corporate power. When workers tried to unionize or strike, employers turned to courts, and judges denied workers a right to be heard on the lawfulness of their association and enjoined often lawful forms of association, showing how procedural design was closely linked to the ability of workers to associate and therefore exercise countervailing power.

The remaining norms specified the solution and shape of reform. The second norm was a "demand for publicity." These actors believed that the right to publicity, gained through access to public hearings, would work to counteract economic power imbalances for economically less-advantaged parties. Finally, the third norm was a procedural "demand for aggregation." Reformers believed that equity procedure needed to be structured to limit the ability of judges to interfere with citizen aggregation and association, reasoning that enabling economically less-advantaged parties to combine their power would lessen

[63] GALBRAITH, *supra* note 30, at 170.

power imbalances.[64] Unlike a substantive demand for aggregation, such as a demand for union recognition, this was a demand for certain *procedures* to be followed before courts enjoined worker association.

Thus, advocates for procedural reform argued for procedures allowing workers the right to be heard (publicity) and cabining judicial discretion to enjoin worker association (aggregation). Publicity and aggregation came to be seen as procedural mechanisms of state facilitation of the exercise of countervailing power.[65] Workers with a right to be heard and the ability to aggregate power could share information and form into associative units to exercise countervailing power, augmenting their bargaining power and potentially diminishing excesses of corporate concentration. Indeed, after the passage of the NLGA, it was not only the case that labor injunction procedure generally no longer operated to entrench the power of employers: Unions also turned to these more open courts to enforce their rights and remedy employer violations of law and contract.[66] Thus, while open hearings and procedures protecting association and aggregation of power are often thought of as democratic goods, these procedural struggles aid in elaborating their economic functions.

Having surveyed the economic context in which labor injunction procedure operated and the reform demands that arose from that context and procedure's interaction with it, I now turn to the history that brings these concepts to life.

B. The Growth of the Labor Injunction

The labor injunction was "America's distinctive contribution in the application of law to industrial strife."[67] As the country industrialized, the proportion of workers seeking to join unions to strengthen their bargaining power increased. The associational aims of workers—in unionization efforts, boycotting companies, and even in protesting industrial activity—came before the courts when employers argued that these forms of association were unlawful and would cause irreparable harm to their property and business if not enjoined. Labor injunctions emerged alongside "a sharp increase in the proportion of strikes called and orchestrated by unions."[68] Strikes, once local

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[64] The term "aggregation" is used here to refer to mechanisms through which persons join together associatively to pursue common ends. Aggregation may take the form of a consumer association, or, more formally, association in worker unions or through "mass" and "class" actions.

[65] For a more thorough analysis of these developments, see Part IV.

[66] *See, e.g.*, *infra* note 276 and accompanying text (explaining how the NLRA and the NLGA gave employees the right to institute proceedings against their employers).

[67] FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 53 (1930).

[68] FORBATH, *supra* note 16, at 63.

affairs, were being commenced by national and regional unions with greater organizational capacity.[69]

Injunctions are equitable remedies. Unlike actions at law, in which federal courts at the time generally applied the procedures of the state courts in which they sat,[70] injunctions as equitable remedies were governed by federal rules—the Federal Rules of Equity (Equity Rules).[71] The Equity Rules, as commentators have widely noted, were binding but rarely followed by federal district courts, which had seemingly not yet internalized the norm of federal control over procedure.[72] The labor injunction was no exception.

In the early twentieth century, the labor injunction provoked deep questions about the exercise of equitable power. Equity was the domain that had developed to provide "relief when the remedy 'at law' was inadequate"—such as when irreparable harm would be

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[69] *See* William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1152–53 (1991); *see also* E.T. HILLER, THE STRIKE: A STUDY IN COLLECTIVE ACTION 1–11 (1928) (discussing the historical origins of striking and a typical strike in the 1920s). There was also an increase in sympathy strikes, boycotts, and larger public protests. *See* FORBATH, *supra* note 16, at 63 (explaining that the rise of union-led strikes coincided with a rise in sympathetic and recognition strikes); *see also* Fred S. Hall, *Sympathetic Strikes and Sympathetic Lockouts*, 10 STUD. IN HIST., ECON. & PUB. L. 9, 9–28 (1898) (describing the growth of sympathetic strikes).

[70] Since the beginning of the republic, federal courts lacked the authority to draft rules of procedure for actions at law. Instead, in actions at law, state law procedure was employed by federal courts, as mandated by the Process Act of 1789. Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93–94. For about the first century of the country's existence, federal courts applied the state law procedures that were in effect at the time that the state had joined the union, even if the procedural practices within the state had evolved through common law iteration or the adoption of codes of procedure. PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 668–70 (2d ed. 1973). The Conformity Act of 1872 ended this regime, mandating that federal courts follow the procedures currently used in the states where they sat. Conformity Act of 1872, ch. 255, §§ 5–6, 17 Stat. 196, 197; Joseph A. Wickes, *The New Rule-Making Power of the United States Supreme Court*, 13 TEX. L. REV. 1, 6 (1934) (discussing how the inconvenience of having federal courts use different systems of pleading led to the enactment of the Conformity Act).

[71] JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 9 (7th ed. 1930) (describing the Supreme Court's statutory authority to promulgate rules of equity for circuit and district courts).

[72] *See, e.g.*, ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 160 (1987) (attributing the questionable efficacy of the Equity Rules to judicial resistance); Erwin N. Griswold & William Mitchell, *The Narrative Record in Federal Equity Appeals*, 42 HARV. L. REV. 483, 494 (1929) (noting that over fifteen years after the promulgation of the Equity Rules, only one circuit had updated their narrative testimony rules to conform to the Equity Rules). As one federal district court judge put it, "very little attention had been paid to [the Equity Rules], and I doubt if any case can be found in any of the courts where they have been scrupulously and exactly enforced, or where they have been even nearly followed." SURRENCY, *supra* note 72, at 160 (quoting Electrolibration Co. v. Jackson, 52 F. 773, 773 (W.D. Tenn. 1892)).

done—and was thus intended to be a safety valve.[73] But equity took on increased importance in an era when labor issues had become central national political issues. As two contemporaneous commentators said, equity was meant to be a "supplementary law" but in America it had "absorbed the law" and "rewritten the American code of industrial conflict."[74]

The power to issue labor injunctions was established by the Supreme Court in *In re Debs* in 1895.[75] The American Railway Union, of which Eugene V. Debs was president, had commenced the infamous Pullman Strike, a clash between the American Railway Union and the Pullman Company, over a severe cut to wages.[76] The strike crippled much of the country's western railway transit. A federal district court issued an injunction enjoining members of the union broadly from attempting to "compel or induce" employees to "refuse or fail to perform any of their duties" in connection with the business of the railroads.[77] The Supreme Court held the injunction to be a constitutional exercise of power under the Interstate Commerce Clause. The Court relied upon the fact that Debs and the American Railroad Union had prohibited trains from leaving Chicago and caused strikes on roads near to and on the railways, thus influencing the course of interstate commerce.[78]

After *In re Debs*, judicial use of the labor injunction grew in ways that revealed the relationship between civil procedure and economic power. The procedural practices of courts issuing labor injunctions both diminished the ability of employees to associate and aggregate their power and diminished their ability to make claims in open court about why their association was lawful and necessary under prevailing economic conditions. From these practices, commentators began to

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[73] OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE 26 (2003); *see* JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 267–376 (2009) (detailing the origins of equity); Subrin, *supra* note 22, at 920 (discussing how the concept of equity fits into the overall legal system).

[74] FRANKFURTER & GREENE, *supra* note 67, at 47.

[75] 158 U.S. 564 (1895).

[76] Scott Reynolds Nelson, *The Ordeal of Eugene Debs: The Panic of 1893, the Pullman Strike, and the Origins of the Progressive Movement* (describing the history and impact of the Pullman Strike), *in* WORKERS IN HARD TIMES: A LONG VIEW OF ECONOMIC CRISES 99, 104–08 (Leon Fink, Joseph A. McCartin & Joan Sangster eds., 2014).

[77] *Id.* at 571.

[78] *Id.* at 580–84. For an incisive critique of *In re Debs*, see Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 61–65 (1993).

reason about the problem of economic power and to call for aggregation and publicity.[79]

First, consider how the procedures surrounding labor injunctions thwarted worker aggregation efforts. Against the grain of the history of equity, in which injunctions were narrowly tailored against parties,[80] writs broadly restrained the associational efforts of workers. For example, writs restrained "all persons combining and conspiring with them, and all other persons whomsoever"[81] and behaviors like using "abusive language"[82] and words like "unfair."[83] Workers were at times enjoined from voting on whether to strike.[84] As Jon Kerian, a contemporaneous academic writer, remarked, judges were suddenly denying previously lawful forms of association and giving business owners legal privileges never conferred by law.[85] "In almost every injunction there was the catch-all or dragnet phrase 'from doing any and all acts in furtherance of any conspiracies to prevent the free and unhindered control of the business of the complainants.'"[86] At times, "free and unhindered control" meant not having to deal with unions or worker association.[87] In other instances, injunctions all but prohibited union officers from fulfilling their legal duties.[88]

Fashioning injunctions to cover such strikingly large classes of people was a significant departure from the historical use of equitable remedies, which were applied in personam: against particular persons who were engaged in activity seriously harmful enough to draw out the arm of equity.[89] Influential scholars Felix Frankfurter and

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[79] For a foundational account, see generally Felix Frankfurter & Nathan Greene, *Congressional Power Over the Labor Injunction*, 31 COLUM. L. REV. 385 (1931) (discussing the Shipstead Bill as a potential avenue for reforming the procedural and substantive deficiencies of the labor injunction).

[80] Charles Noble Gregory, *Government by Injunction*, 11 HARV. L. REV. 487, 488 (1898) (surveying the history of limited and targeted injunctions).

[81] *Debs*, 158 U.S. at 570; *see also* Zechariah Chafee, Jr., *The Progress of the Law, 1919–1920*, 34 HARV. L. REV. 388, 401–07 (1921) (detailing broad injunctions).

[82] Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 246 (1917).

[83] Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 420 (1910).

[84] *E.g.*, A. R. Barnes & Co. v. Berry, 156 F. 72, 78–89 (1907) (noting that workers could "take it into their own hands" to "walk out," but enjoining union officers from organizing a vote to do so).

[85] Jon R. Kerian, *Injunctions in Labor Disputes: The History of the Norris-LaGuardia Act*, 37 N.D. L. REV. 49, 51–52 (1961).

[86] *Id.* at 51.

[87] *See infra* note 91 and accompanying text (discussing how far injunctions were stretched).

[88] *See, e.g.*, U.S. STRIKE COMM'N, REPORT ON THE CHICAGO STRIKE OF JUNE–JULY, 1894, at 143–44 (1895) (quoting one union officer as testifying that "[f]rom Michigan to California there seemed to be concerted action on the part of the courts" to prevent officers "from exercising any of the functions of [their] offices").

[89] Gregory, *supra* note 80, at 488–89.

Nathaniel Greene were perplexed by this departure from historical practice, noting that the bills of complaint in the injunction cases were only served on the named defendants yet injunctions were fashioned against sweeping classes.[90] As a prominent conservative lawyer stated, with injunctions sweeping so broadly, the "principles of equity jurisprudence have received an important extension which may render 'government by injunction' more than a mere epithet."[91] Or, as Holmes put it: "We cannot issue a general injunction against all possible breaches of the law."[92] Other injunctions prohibited defendants from speaking in any way about a strike or seeking the advice of counsel.[93] Throughout all of this, the possibility of criminal contempt hearings for violating the injunctions loomed.

Second, injunction procedures diminished the opportunities for workers to be heard in open court and therefore to claim the lawfulness of their association, raising the demand for publicity. In these instances, the Equity Rules typically applied, but many federal district courts deviated from them.

To understand how these injunctions deviated from the Equity Rules and how they diminished opportunities for open hearings, it is useful to outline the procedures employed. In theory, injunction procedure was governed by Rule 73 of the Equity Rules.[94] Rule 73 provided that no preliminary injunction was to be issued without notice to the opposite party, and that even temporary restraining orders were not to be granted without notice to the opposing party "unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice."[95] After a com-

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[90] FRANKFURTER & GREENE, *supra* note 67, at 86–87.

[91] W.H. Dunbar, *Government by Injunction*, 13 L.Q. REV. 347, 354 (1897). To ensure the fullest effect of the injunction reaching the world, complainants often printed them, translated them to prevalent local languages, distributed them by deputy marshals, published them in newspapers, and mailed them to "all possible offenders," present or future. FRANKFURTER & GREENE, *supra* note 67, at 125. Sometimes it was the courts themselves who ordered these measures. *See id.* at 125 n.168 (collecting cases).

[92] Swift & Co. v. United States, 196 U.S. 375, 396 (1904) (considering an injunction against a defendant business and noting that an injunction should not be "so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt").

[93] Injunctions enjoined defendants, among other things, from "printing, publishing, issuing, circulating and distributing, or otherwise communicating, directly or indirectly, in writing or verbally to any person, association of persons, or corporation, any statement or notice of any kind or character whatsoever, stating or representing" the details of the strike. S. REP. NO. 72-163, at 17 (1932) (noting that the injunction in question barred defendants from seeking the advice of an attorney).

[94] FED. R. EQ. 73 (1912) (repealed 1938), *reprinted in* HOPKINS, *supra* note 71, at 291.

[95] *Id.*

plaint was filed, regardless of whether or not a temporary restraining order was issued, the court was required to set a date for a preliminary hearing upon notice and offer an opportunity to be heard.[96] If a temporary restraining order was issued, it typically remained in effect during the period between the filing of the complaint and the hearing.[97] In the case of a temporary restraining order granted without notice, Rule 73 required that the "matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order," giving the court an opportunity to more carefully assess the injunction shortly thereafter.[98]

But procedural deficiencies abounded at every stage of the injunction process. First, instead of containing the "specific facts" required by Rule 73,[99] complaints were often "cookie cutter" bills broadly alleging illegal worker activity that would cause irreparable harm. These bills presented issues of fact that hearings could have helped to adjudicate, such as whether there was violence, coercion, or other "requisite event[s]" occurred.[100] All of the bills were "cut according to the same master pattern":[101]

> The complainant has property, business relations and contracts of great value, described with varying degrees of minuteness; to damage this business, the defendants have formed an unlawful conspiracy, in pursuance of which they intend to strike, or have gone on strike, or are inducing others to go on strike, and have committed, or have caused to be committed acts of violence, intimidation and coercion—acts of violence sometimes specifically described, often alleged in general terms, or, lacking even that, threats of violence; finally, allegations essential for equitable jurisdiction wind up the story—irreparable damage and inadequacy of the legal remedy.[102]

A Wisconsin judge asserted that such skeletal complaints improperly called for a "blanket injunction upon a blanket complaint abounding in general conclusion but lacking in facts and circumstances."[103] The judge went on to say that the purposes of the injunction and the history of equity required a complaint seeking an injunction to be "detailed, certain, and specific," containing the "time

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96 *Id.*

97 *Id.*; *see also* EDWIN E. WITTE, THE GOVERNMENT IN LABOR DISPUTES 93–94 (1932) (describing the process).

98 FED. R. EQ. 73 (1912) (repealed 1938), *reprinted in* HOPKINS, *supra* note 71, at 291.

99 *Id.*

100 FRANKFURTER & GREENE, *supra* note 67, at 61.

101 *Id.*

102 *Id.* at 61–62. For examples of cases stemming from such complaints, see Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917), *In re* Debs, 158 U.S. 554, 566–70 (1895), and Nat'l Protective Ass'n v. Cumming, 53 A.D. 227, 228–29 (N.Y. App. Div. 1900).

103 Badger Brass Mfg. Co. v. Daly, 119 N.W. 328, 330 (1909).

and place of each alleged act of coercion, the name of the person coerced, if known, the manner in which he was coerced, and the manner in which and the extent to which it affected or impeded the employer's right to conduct his business in a lawful way."[104] Without such detail, worker-defendants ought to have been entitled to a right to be heard.

Yet, despite the skeletal nature of these complaints, temporary restraining orders were abundant. Indeed, of that cases the Frankfurter and Greene found in the Federal Reporter, in only one had a judge denied such a restraining order.[105] The relative ease with which employers could procure even temporary restraining orders based on such complaints, and at times without providing notice to the workers enjoined, harmed organized labor. The temporary restraining order was "the most [important] of all injunctive writs because strikes are usually won or lost within a few days and they were issued as a matter of course."[106] As Chief Justice Taft put it:

> The temporary restraining order is served on all the strikers; they are not lawyers; their fears are aroused by the process with which they are not acquainted; and, although their purpose may have been entirely lawful, their common determination to carry through the strike is weakened by an order which they never have had an opportunity to question, and which is calculated to discourage their proceeding in their original purpose.[107]

In addition, while the Equity Rules required testimony to be taken in open court,[108] judges often ignored their mandate, deciding whether to extend a temporary injunction into a preliminary injunction (which would last through trial) based on the complaint and answer alone.[109] Even where judges held hearings, many restricted opposing counsel to argument, with no opportunity to put in evidence

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[104] *Id.* Frankfurter and Greene also found that of the 118 cases reported in federal courts during the nearly three decades before they wrote their book, in only twelve instances were the complaints accompanied by affidavits. FRANKFURTER & GREENE, *supra* note 67, at 64.

[105] *Id.* at 60 (noting that of the 118 relevant cases reported between 1901 and 1928, federal judges granted seventy ex parte restraining orders and denied one).

[106] Kerian, *supra* note 85, at 51.

[107] OSCAR KING DAVIS & THEODORE ROOSEVELT, WILLIAM HOWARD TAFT: THE MAN OF THE HOUR: HIS BIOGRAPHY AND HIS VIEWS ON THE GREAT QUESTIONS OF TO-DAY 338–39 (1908).

[108] FED. R. EQ. 73.

[109] *See* FRANKFURTER & GREENE, *supra* note 67, at 63–66 (describing how judges issued injunctions on the complaints and answers alone without affording defendants a right to be heard).

or hear testimony.[110] And the parties rarely got to trial, during which they could publicly make out their case and only after which a permanent injunction might be issued, because the strike would be settled—or, more likely, aborted—during the time period covering the temporary and preliminary injunction.[111]

The procedures worked against the kind of notice, open testimony, and examination in court that might have revealed the weakness of the employers' claims. Judges denied workers the ability to examine and cross-examine witnesses and to challenge legal interpretations that certain forms of worker association were conspiratorial or otherwise criminal. In this way, procedure strengthened the hand of the economically more powerful party. The lack of testimony was all the more puzzling in light of the unsupported factual assertions made in the "cookie cutter" complaints. And it was inconsistent with the development of the Equity Rules, which had through Rule 46 provided for oral interrogatories and the opportunity to be heard progressively since their inception.[112] Despite Rule 46, judges relied on general complaints to issue preliminary injunctions, asserting that testimony was not necessary even when unions asked to have witnesses give testimony in open court.[113]

Employer affidavits might have fleshed out complaints, making open testimony less critical for judges to reach a conclusion. Rarely did affidavits accompany complaints seeking temporary restraining orders, yet as described above, in nearly all of the cases listed in the federal reporters during the period when Frankfurter and Greene wrote where parties requested temporary restraining orders, they were granted ex parte.[114]

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110 WITTE, *supra* note 97, at 92; *see also* FRANKFURTER & GREENE, *supra* note 67, at 66–81 (describing the judicial reliance on affidavits as proof, and noting strenuous criticisms of that approach).

111 WITTE, *supra* note 97, at 93.

112 *See* FED. R. EQ. 77 (1842), *reprinted in* HOPKINS, *supra* note 71, at 58–59 ("After the cause is at issue, commissions to take testimony may be taken out . . . upon interrogatories filed by the party taking out the same, in the clerk's office, ten days' notice thereof being given to the adverse party to file cross interrogatories before the issuing of the commission . . . . In all cases the commissioner or commissioners shall be named by the court, or by a judge thereof."); FED. R. EQ. 67 (1893), *reprinted in* HOPKINS, *supra* note 71, at 121 (permitting "the whole . . . of the evidence to be adduced orally in court"); FED. R. EQ. 46 (1912) (repealed 1938), *reprinted in* HOPKINS, *supra* note 71, at 240 (stating that in "all trials in equity the testimony of witnesses shall be taken orally in open court").

113 *See supra* notes 108–09 and accompanying text. Courts also failed to ensure that the matter was "returnable" no later than ten days from the date of the grant of the order, as required by Rule 73. *See* FED. R. EQ. 73 (1912) (repealed 1938), *reprinted in* HOPKINS, *supra* note 71, at 291; FRANKFURTER & GREENE, *supra* note 67, at 186. This made temporary injunctions more permanent than the Equity Rules intended.

114 FRANKFURTER & GREENE, *supra* note 67, at 57 n.40, 60–64.

In the few instances when workers pushed for trials, they were almost always denied, and trial by jury, though a demand of the labor movement,[115] was often not even considered by judges; because judges ruled so swiftly on the pleadings, "the testimony of witnesses [was] rarely invoked."[116] In contrast, the court in one case, *Garrigan v. United States*,[117] remarked that "the opposing affidavits, 'as is usual in such controversies, were directly contradictory of each other'" and that with "such irreconcilable conflict of testimony, it is often impossible to get a clue to the truth."[118]

These procedures led many commentators to conclude that the Equity Rules had become "too loose and unguarded."[119] They also prompted the demands for publicity and aggregation.

C. *The Clayton Act*

Legislators attempted to respond to these procedural issues, but with little success at the time. In 1914, Congress passed the Clayton Act,[120] attempting to specify the kinds of worker association that were not to be enjoined and to clarify the procedures that needed to be followed before courts could issue injunctions.

With regard to association, for example, the Act stated that unions were neither to be "held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws" nor to be enjoined from "carrying out [their] legitimate objects."[121] Federal courts, however, continued to enjoin wide forms of worker activity beyond strikes and protests related to wages and hours, essentially returning the law to its status before the Act was enacted.[122]

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115 *Id.* at 57 n.40.

116 *Id.* at 55.

117 163 F. 16 (7th Cir. 1908).

118 *Id.* at 20 (quoting Employers' Teaming Co. v. Teamsters' Joint Council, 141 F. 679, 689 (C.C.D. Ill. 1905)).

119 Felix Frankfurter & Nathan Greene, *Labor Injunctions and Federal Legislation*, 42 HARV. L. REV. 766, 767 (1929).

120 Clayton Act, Pub. L. No. 63-212, ch. 323, 38 Stat. 730 (1914) (codified as amended in 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2012)).

121 *Id.* § 6, 38 Stat. at 731.

122 Ralph K. Winter, Jr., *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 33 (1963) (noting that ambiguities in the Clayton Act led judges to interpret its protections so narrowly that "unless the Court had been prepared to bar the very existence of labor organizations, the labor provisions of the Clayton Act had little impact indeed"). When employees aimed at a purpose "one degree more remote" from the employment contract than wages or hours, such as strengthening their union as a "means to enable it to make a better fight on questions of wages or other matters of clashing interests," Plant v. Woods, 44 N.E. 1011, 1016 (Mass. 1900) (Holmes, C.J., dissenting), courts varied in approach to the problem. FRANKFURTER

Courts, for example, widely restrained pickets.[123] And the Supreme Court effectively stripped the provisions of the Clayton Act protecting worker association of their teeth by finding that various forms of labor association, including boycotting or "even persuasion" directed at third parties that fell short of a full-on boycott, were illegal and that the Act was merely declaratory of the law before its passage.[124]

The Clayton Act also attempted to entrench the procedural portions of the Equity Rules more deeply in order to provide workers with access to open public hearings. Section 17 of the Clayton Act was tied to Rule 73 of the Equity Rules and went beyond its requirements.[125] It permitted courts to grant temporary restraining orders without notice to defendants only when it was made clear based on testimony under oath that the applicant would otherwise suffer irreparable injury.[126] It also required the court orders to state the reasons for the injunction's issuance and for a temporary restraining order to expire within a fixed time after its entry, not to exceed ten days.[127] But these provisions were largely ineffective. Between 1914 and 1928, more restraining orders would be issued by federal district courts without notice "than in any prior period of like duration."[128] In most instances, those orders remained in force without hearings being held beyond the ten-day period allowed by Section 17.[129] In addition, judges widely disregarded the mandate to set forth the reasons for the

& GREENE, *supra* note 67, at 29. Some courts held that unionization efforts were not properly to be enjoined; still others thought that they were. *See id.* at 29–32.

123 *E.g.*, Am. Steel Foundries v. Tri-City Cent. Trade Council, 257 U.S. 184, 205 (1921) (concluding that picketing "indicate[s] a militant purpose"); Kolley v. Robinson, 187 F. 415, 417 (6th Cir. 1914) (finding picketing to generally be illegal); Otis Steel Co. v. Local Union No. 218, 110 F. 698, 701–02 (N.D. Ohio 1901) (same); Southern Ry. Co. v. Machinists' Local Union No. 14, 111 F. 49, 58–59 (W.D. Tenn. 1901) (same); *see also* Atchison, T. & S.F. Ry. Co. v. Gee, 139 F. 582, 584 (S.D. Iowa 1905) ("There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching.").

124 Duplex Printing Press Co. v. Deering, 254 U.S. 443, 477–78 (1921) (concluding that a secondary boycott is a restraint of trade and that an injunction can issue against such a practice); *see* Winter, *supra* note 122, at 33. After the Clayton Act, indeed, a wide course of worker organizational activities was still found to be illegal, a result that contributed to the weakening of the labor movement throughout the 1920s. Though abolishing these "restrictions on collective action" was the "chief political goal" of the AFL from the 1890s through the New Deal, it lost momentum in the days after the *Duplex Printing Press* case. William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 184 (2001).

125 *See* FRANKFURTER & GREENE, *supra* note 67, at 184–85 & n.196 (explaining the background of the Clayton Act).

126 *See id.* (interpreting the Clayton Act).

127 *See id.*

128 *Id.* at 185–86.

129 *Id.* at 186.

order and ignored the demand for testimony under oath.[130] While Congress had spoken on injunctive procedure, the federal courts were not yet listening.

D. Public Discourse

Examining labor injunction procedures ultimately led progressive and conservative lawyers to become concerned about procedural political economy and questions of economic power. In an industrial era, where employers and owners had accrued significant economic power, legal commentators became concerned that civil procedure weakened the efforts of workers to counterbalance that power. As the premises of employer-employee "freedom of contract" came unwound in light of power and bargaining disparities, civil procedure came to be seen as not only maintaining those disparities, but as strengthening the hand that was already stronger.

This Section describes the dialogue around labor injunction procedural reform through the three norms presented above: the problem of economic power, the demand for publicity, and the demand for aggregation. Since the NLGA effectively demonstrates the way that the three norms moved through progressive circles and came to be reflected in national legislation, this Section only briefly summarizes the progressive response to the labor injunction. It then focuses more on the conservative response, showing how American Bar Association (ABA) leaders—known for opposing child labor and minimum wage laws and therefore often construed as being against workers' rights—critiqued these procedures.

In addition, while scholars have explored the ABA's advocacy for federal rules of civil procedure, this Section ties the demand for such rules to their frustrations about the lack of uniformity among judges issuing labor injunctions. In particular, the following analysis complicates the existing view that William Howard Taft, a leader among the conservatives advocating for federal civil procedure, was a purely anti-labor force. I challenge this view by showing how his concerns about the labor injunction and economic power informed his advocacy for federal rules of civil procedure.

1. Progressives and Labor

Some commentators focused on procedure and economic power believed that federal district courts had directly exacerbated power imbalances. The American Federation of Labor (AFL) argued that "[t]hrough . . . unwarranted uses and flagrant abuses" of injunction

130 *Id.* at 186–87.

procedure, the "courts of equity have become the courts of the rich, the protectors of property and of property rights, and have disregarded the human aspirations and personal rights of the workers."[131] The charge of one-sidedness was not always so strong; indeed, more moderate variants were more common. As Edwin Witte put it in his tome, *The Government in Labor Disputes,* injunction procedures had "handicapped" the very party that was weaker in the economic system because "[o]nly a strong union can bargain effectively or hope to win and maintain for its members the higher wages, shorter hours, and better conditions of labor" which are "indispensable" in the industrial economic system.[132] Commentators therefore began with the premise that in an economic system where concentrated employer power had accrued, it needed to be counteracted with worker power. They then lamented that civil procedure, rather than facilitating the right of workers to be heard about the lawful and necessary nature of their association, thwarted their efforts.

Progressives framed the demand for aggregation by arguing that worker freedom of association was a fundamental right founded in the guarantees of the First and Fourteenth Amendments, and some even went so far as to suggest that, in the absence of worker association, prevailing economic conditions constituted industrial slavery, violating the Thirteenth Amendment.[133] They argued that judges, while gesturing towards workers' rights, subverted them in favor of employers' property interests, extending employer property rights in novel ways to include the interest in conducting a profitable business without worker interference.[134] Progressives argued that fundamental associational rights were deemed by courts to be inferior to such newly-discovered, intangible property rights, without adequate balancing or analysis.[135]

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131 E.E. Witte, *Value of Injunctions in Labor Disputes*, 32 J. POL. ECON. 335, 346 (1924).

132 WITTE, *supra* note 97, at 294, 298.

133 *See* Forbath, *supra* note 51, at 1128 ("Workers' rights to associate, assemble, organize, and strike constituted First, Thirteenth, and Fourteenth Amendment . . . claims repeatedly spurned by the courts that labor brought again and again to Congress and state legislatures."); *see also* James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1 (2002) (detailing the strategic choice to base labor law statutes in the Commerce Clause rather than the Thirteenth Amendment).

134 *See* Haggai Hurvitz, *American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and the Judicial Reorientation of 1886–1895*, 8 INDUS. REL. L.J. 307, 355–56 (1986) (noting that courts not only recognized "entrepreneurial liberties" as property rights, but indeed found those rights to be "constitutionally superior" to workers' civil liberties). For an example of an entrepreneurial property rights case, see *State v. Julow*, 31 S.W. 781 (Mo. 1895).

135 *See* Hurvitz, *supra* note 134, at 354–55 (outlining the arguments of the state legislatures that banned yellow-dog contracts in the early 1890s).

Finally, the labor movement and progressives also focused on the demand for publicity. The labor movement critiqued procedures of courts that would not allow them to put employers or workers on the stand, and fought hard for open hearings and trial by jury in contempt trials, pushing for the open air of the courtroom and for the judgment of their peers.[136] Justice Brandeis championed these arguments, for example noting that the lack of a right to be heard was especially problematic where charges of violating an injunction—criminal contempt of law—were also "heard on affidavits merely, without the opportunity of confronting or cross-examining witnesses."[137]

2. *Conservatives and the ABA*

Conservative forces, too, took notice. The injunction was a powerful remedy, which made the procedures employed by courts both so important to maintaining the judicial authority that the ABA privileged and such a powerful lever for generating a public discussion around procedure. As one commentator put it, the injunction, by preemptively employing the power of courts to restrain action, was "the strong arm of equity."[138] That writer was Charles Claflin Allen, in an essay penned in the 1894 edition of the ABA's journal, prepared for its annual conference.[139]

Allen's essay would become important to the conservative critique of the labor injunction. The ABA membership had anticipated the essay and it was discussed at length at their meeting.[140] Allen had undertaken a study of the procedures of courts issuing injunctions, and his response was critical. Perhaps unsurprisingly, Allen identified the problems related to aggregation and publicity. In terms of aggregation, Allen critiqued injunctions applying to thousands of workers, or even to "all other persons whatsoever," noting that injunctions, as

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136 FRANKFURTER & GREENE, *supra* note 67, at 57 n.40 (detailing "labor's antagonism" to the lack of right to trial by jury); *see also* Alpheus T. Mason, *The Labor Decisions of Chief Justice Taft*, 78 U. PA. L. REV. 585, 603–04 (1930) (detailing Taft's view of the right to trial by jury and how it, in part, appeased labor figures).

137 Truax v. Corrigan, 257 U.S. 312, 367 (1921) (Brandeis, J., dissenting) ("The effect of the proceeding upon the individual was substantially the same as if he had been successfully prosecuted for a crime; but he was denied, in the course of the equity proceedings, those rights which by the Constitution are commonly secured to persons charged with a crime.").

138 Charles Claflin Allen, *Injunction and Organized Labor*, 17 ANN. REP. A.B.A. 299, 300 (1894) (quoting JAMES L. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS 223 (1st ed. 1874)).

139 *Id.* The essay was reprinted as Charles Claflin Allen, *Injunction and Organized Labor*, 28 AM. L. REV. 828 (1895).

140 *See Discussion on* Injunction and Organized Labor, 17 ANN. REP. A.B.A. 15, 15–51 (1894).

strong-arm measures targeting particular practices, should be directed in personam.[141] With regard to publicity, he critiqued injunctions issued without adequate notice, the scope of ex parte proceedings, and contempt proceedings where parties lacked a right to be heard or trial by jury.[142] Allen concluded, years before Frankfurter and Greene would in their volume, that "the history of equity jurisprudence furnishes no precedent" for such practices.[143]

Around the same time, another topic related to civil procedure was also gaining the attention of the ABA's membership: the demand for a federal regime of rules of civil procedure (and, for some ABA members, the merger of law and equity under that regime). Roscoe Pound, a leading scholar who would later become Dean of Harvard Law, brought the issue to the group's attention in a speech before the ABA in 1906.[144] William Howard Taft echoed Pound's concern, with another powerful speech on the need for federal rules of civil procedure in 1908—one less theoretical than Pound's and more tied to the ABA's darling issue of the authority of the federal courts—and the topic soon after became a perennial one within the ABA.[145]

In 1912, with growing support in the legal community—and with the President of the ABA, Thomas Shelton, following Taft's lead[146]—the ABA drafted a bill to be introduced in Congress establishing federal rules of civil procedure.[147] The bill roughly formed the basis of the Enabling Act,[148] just as the procedural practices that Allen had critiqued were addressed and reformed by the NLGA. These two legal stories—the labor injunction and the rise of the Rules—are often told separately. Scholars have shown how procedural reformers

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141 *See* Allen, *supra* note 138, at 315–22.

142 *Id.*

143 *Id.* at 316.

144 Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 409–13 (1906). For descriptions of Pound's influence on procedural reform, see James R. Maxeiner, *1992: High Time for American Lawyers to Learn from Europe, or Roscoe Pound's 1906 Address Revisited*, 15 FORDHAM INT'L L.J. 1, 5–15 (1991), Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513 (2006), and John H. Wigmore, *Roscoe Pound's St. Paul Address of 1906: The Spark that Kindled the White Flame of Progress*, 20 J. AM. JUDICATURE SOC'Y 176 (1937).

145 William Howard Taft, *The Administration of Justice—Its Speeding and Cheapening*, 21 VA. ST. BAR REP. 233 (1908), *reprinted in* William H. Taft, *The Delays of the Law*, 18 YALE L.J. 28 (1908) (arguing for the need for federal rules of civil procedure and the merger of law and equity).

146 *See, e.g.*, Thomas Wall Shelton, *Let Congress Set the Supreme Court Free*, 75 CENT. L.J. 126 (1912) (calling for uniform federal civil procedure); Thomas W. Shelton, *The Relation of Judicial Procedure to Uniformity of Law*, 72 CENT. L.J. 114 (1911) (same); *see also* Burbank, *supra* note 22, at 1049 (detailing this history).

147 Burbank, *supra* note 22, at 1050.

148 *See id.* at 1069–101 (tracing the Enabling Act back to the 1912 bill).

pushing for federal rules of civil procedure focused, among other things, on the increasing complexity of state procedures, which federal courts were supposed to follow generally in actions at law,[149] and on the simplicity that uniform rules could bring.[150] But the tales of the labor injunction and the rise of the Rules are more aligned than these accounts suggest.

One reason that scholars have overlooked the overlapping origins of the NLGA and the Rules may in fact be Taft. He was a central and somewhat misunderstood figure in both stories. Taft has been framed by scholars as a leading "conservative and anti-labor" force who played a central role both in the rise of the labor injunction and in the development of the federal rules of civil procedure.[151] Both notions are accurate to an extent. As a judge, Taft issued or upheld more labor injunctions than he denied or overturned,[152] and hewed to a judicial philosophy that at times led him to find that boycotts and strikes beyond those relating to wages and working conditions were illegal.[153] And as an advocate, he was a "pivotal figure" in the struggle to create federal rules of civil procedure.[154] He was no doubt motivated in part to protect and maintain the authority of the federal judiciary.[155]

Taft, however, is more complex than this account allows. While Taft's anti-labor reputation was also well-earned by, among other things, his occasional association of labor unions with Bolshevism and

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149 *See supra* note 70 and accompanying text.

150 New York's Field Code, adopted in 1848 and followed by similar codes in other states, was a leading example. *See* An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, 1848 N.Y. Laws 497. It was criticized by law reformers as being "unnecessarily rigid and elaborate." EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 28 (2000); *see* Burbank, *supra* note 22, at 1046 (detailing an ABA report criticizing the Field Code). At the same time, the Conformity Act itself was not fulfilling its purpose of ensuring that federal courts followed state procedure in actions at law. The Conformity Act, for example, included the qualification that federal procedure should conform "as near as may be" to state procedure. Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197. This language gave federal courts the discretion "to decline conformity to state law and thus to perpetuate the inconvenience to the bar that it was the purpose of the Act to eliminate." Burbank, *supra* note 22, at 1041.

151 PURCELL, *supra* note 150, at 21.

152 *See* Mason, *supra* note 136, at 622 (surveying Taft's labor decisions and concluding that "in practically every case, whether as state judge, circuit judge, or Chief Justice, he has decided against the labor organization or the cause with which it sympathized").

153 *See generally* FORBATH, *supra* note 16, at 89–90; Mason, *supra* note 136, at 589–604 (describing Taft's role in expanding the federal judiciary's use of the labor injunction).

154 PURCELL, *supra* note 150, at 27; Subrin, *supra* note 25, at 694; *see also* Burbank, *supra* note 22, at 1026, 1069–71 (attributing the requirement that proposed rules be submitted to Congress to Taft's influence).

155 *See* PURCELL, *supra* note 150, at 27–28 (describing Taft's motivations).

his now-infamous quip that labor was a "faction we have to hit every little while,"[156] he also maintained that unions were "valuable assets" in an industrial order and had expressed concern about the "militancy of businessmen" vis-à-vis labor.[157] Taft also wrote the decisive opinion establishing the ability of unions to sue and be sued, which would become critical for the labor movement.[158] Unions that could sue and be sued could "bring suits and secure injunctions against their employers for damages inflicted by breach of contract, lockouts and black lists."[159] And the decision was also useful insofar as suits against workers, but not their unions, tended to either be too personal, targeting individuals, or too broad, fashioned against all workers or entire communities rather than the union.

Most importantly, Taft expressed concern about the equity procedures of courts issuing labor injunctions, and tied that concern to his advocacy for federal rules of civil procedure. Taft's early advocacy against the procedures of federal judges issuing labor injunctions, that is, often came in the same breath as he argued for the merger of law and equity under federal rules of procedure.[160] In Taft's first annual message to Congress as President in 1909, for example, he began with a call for federal rules of civil procedure. He laid out the general topic of "uncertainties" and "injustice" in legal procedure in the federal courts and argued for a statute to improve procedure "both at law and in equity" in the federal courts.[161] The statute, of course, would become the Enabling Act. Taft's examples of abuses and injustices, when he turned to them, were from the labor injunction context. He discussed the problems related to notice and the right to be heard in the injunctive procedures of some federal courts.[162] This unfortunate procedural situation, he continued, had been caused by a lack of uniformity: "[S]ome [federal] courts" were properly applying the "best

156 ROBERT H. ZIEGER, REPUBLICANS AND LABOR: 1919–1929, at 261 (1969).

157 *Id.* at 75.

158 United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922).

159 Mason, *supra* note 136, at 624.

160 At the time that Taft was encouraging the ABA to push for federal rules, he was running his presidential campaign on a Republican Party platform that called for new "rules of procedure" that would "clarify" the procedures that ought to be employed by courts "with respect to the issuance of the writ of injunction." Republican Party Platform of 1908, *reprinted in* WILLIAM HOWARD TAFT: ESSENTIAL WRITINGS AND ADDRESSES 333 (David H. Burton ed., 2009).

161 William Howard Taft, First Annual Message (Dec. 7, 1909), *reprinted in* 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790–1966, at 2338, 2359, 2360 (Fred L. Israel ed., 1966).

162 *Id.* at 2360.

practice[s] in equity" while others were "issuing . . . ill-advised orders."[163]

Taft thus began with a general reference to "injustices" and "uncertainties" in discussing the need for federal rules, and the examples he turned to involved the labor injunction. His plea for uniformity in federal rules was accompanied by a call for greater uniformity in labor injunction procedure. It is not a stretch to see how both topics relate to his concern about the authority and prestige of the federal courts: Merging law and equity under uniform federal rules would weed out those "ill-advised" procedural practices in injunction cases, among others, that undermined the authority of the federal courts. Taft, then, ought not to be understood as purely anti-labor. Instead, one can see how Taft's concerns about labor injunction procedure were tied to his demand for federal rules of civil procedure.

In addition to his demand for publicity, Taft also considered the problem of economic power and demand for aggregation in his analysis of labor injunction procedures. When Taft accepted the Republican nomination for president in 1908, he spoke about how broad injunctions would affect the association of workers:

> In the case of a lawful strike, the sending of a formidable document restraining a number of [workers] from doing a great many different things which the [employer] avers they are threatening to do, often so discourages men always reluctant to go into a strike from continuing what is their lawful right.[164]

He noted how securing such an order was an "advantage" for the employer, and put the employee at a "disadvantage," which was further compounded by the fact that "workmen" often needed to combine to assert control over their wages.[165] The inference was that the employer's existing economic advantage was redoubled by the problematic procedure.

Taft's views were shared by many of the other leading procedural reformers associated with the ABA. George Wharton Pepper, a conservative lawyer and Pennsylvania politician who would later be part of the Rules Advisory Committee established to draft the federal rules, criticized the procedural practices of federal courts issuing labor injunctions and argued that the deviant practices of some judges undermined the authority of the federal courts. In an influential speech, he compared the practices of American federal judges to

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163 *Id.* at 2361.

164 William Howard Taft, Address Accepting the Republican Presidential Nomination (July 28, 1908) (transcript available at AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=76222 (last visited Jan. 9, 2017)).

165 *Id.*

those in England, remarking: "What they have . . . domesticated we still seek to enjoin."[166] The suggestion was that the power of the injunction was used to control potentially legal activity. Pepper further observed a "growing bitterness of organized labor toward the federal courts."[167] That bitterness was a concern for the ABA, which had been committed to preserving and strengthening judicial authority.[168]

The lack of uniformity in labor injunction procedures was a common theme among conservative procedural reformers. The issues relating to labor injunctions were, to be sure, only one strand of the argument for federal rules of civil procedure. The rise of federal civil procedure was also inspired by the rise of ideals of scientific management, concerns about growing complexity, concerns about access to the courts, and the disjuncture between procedure and citizens' ability to vindicate established rights, among other things.[169] But in the tale of what had gone wrong in American civil procedure, the labor injunction had a starring role even for ABA leaders.

II
THE NORRIS-LAGUARDIA ACT

The NLGA, though more often an object of study for scholars of labor law than of civil procedure, was a significant piece of procedural legislation that capped three decades of labor injunction critique. Finally passed after being introduced in one form or another by progressives for fourteen years,[170] it reflected Congress's recognition

166 George Wharton Pepper, *Injunctions in Labor Disputes*, 47 ANN. REP. A.B.A. 174, 176 (1924).

167 *Id.*

168 *See* S.S. Gregory, *Address of the President*, 35 ANN. REP. A.B.A. 255, 270–71 (1912) (overviewing how the disrepute into which courts had fallen could damage judicial authority).

169 *See, e.g.*, Resnik, *supra* note 5, at 504 (identifying themes including "needs for uniformity of federal practice across the country, for uniformity of practice between law and equity, for reducing the possibility of technical errors, and for greater court (rather than legislative) control of rulemaking"); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1989, 2001 (1989) ("When the proponents of the Enabling Act and the Federal Rules talked and wrote about uniformity they either explicitly or implicitly utilized several interconnected themes: efficiency, professionalization, federalism or nationalism, effective law application, power, and politics.").

170 Kerian, *supra* note 85, at 49. On the legislative front, the twenties were a difficult time for workers and "organized labor seem[ed] to have lost hope of remedial legislation." Edwin E. Witte, *The Federal Anti-Injunction Act*, 16 MINN. L. REV. 638, 638 (1932). Congress seemed unlikely to pass labor injunction legislation until 1928, when the Shipstead Bill was introduced, which tried to curtail the injunction process by separating tangible property from intangible property, like human associations. *See Limiting Scope of*

of the problem of economic power and commitment to addressing it through procedural mechanisms requiring publicity and protecting rights of aggregation. The NLGA was, and should be seen as, part of federal procedural state-building; it was an emphatic statement from Congress that rules of equity were indeed to be followed,[171] and that judicial procedure needed to protect workers' rights to publicity and association. This Part reconstructs the path to and enactment of the NLGA through the lens of the three norms that the Article has traced thus far: the problem of economic power, the demand for publicity, and the demand for aggregation.

A. The Path to 1932

Civil procedure was having its day in American political discourse in the few years before the passage of the NLGA. The labor movement was consumed with issues relating to judicial process.[172] Labor injunction procedure was prominent in the labor movement's attacks on federal judges, especially those up for appointment to a higher court.[173] After all, if workers could not speak about a strike, they could at least speak about the procedures that thwarted not only the strike but also the speech around it. Civil procedure was, too, at the center of President Hoover's struggles to elevate federal circuit judge John J. Parker, who had issued sweeping labor injunctions, to the

Injunctions in Labor Disputes: Hearings on S. 1482 Before a Subcomm. of the S. Comm. on the Judiciary, 70th Cong. (1928) (discussing the Shipstead Bill); FORBATH, *supra* note 16, at 159–60 (noting that Congress was inactive on labor issues for a decade before introducing the Shipstead Bill).

171 *See infra* notes 70–71 and accompanying text (noting that while the Rules of Equity applied to the federal judiciary before the NLGA was passed, they were frequently ignored).

172 *See, e.g.*, U.S. COMM'N ON INDUSTRIAL RELATIONS, FINAL REPORT OF THE COMMISSION ON INDUSTRIAL RELATIONS, S. DOC. NO. 64-415, at 38 (1st Sess. 1915) (observing "an almost universal conviction that [workers] . . . are denied justice in the enactment, adjudication, and administration of law," including through "unwarranted" judicial rulings that "largely nullified" any protections that exist).

173 *See* IRVING BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920–1933, at 411–12 (1960) (describing the outcry over Taft's proposal to appoint the notorious "injunction judge" James H. Wilkerson to the Seventh Circuit Court of Appeals); Witte, *supra* note 131, at 351–53 (noting labor unions' efforts to defeat confirmation of federal judges and to "flood[ ]" the President with endorsements for pro-labor candidates).

Supreme Court—a struggle he ultimately lost.[174] And civil procedure was at the center of a rich congressional discourse.[175]

The public debates about labor injunction procedure were driven in large part by Senator George Norris, a Republican of Nebraska. Senator Norris came to be one of the earliest, and ultimately most influential, figures in the struggle to structure the procedures surrounding labor injunctions in federal district courts. He became attracted to the cause when he attended a campaign event in a Pennsylvania coal town and met a worker who had been injured in mining operations.[176] The encounter motivated Senator Norris to bring to the fore the issues facing workers. He focused on two problems: labor injunction procedure and the yellow-dog contract, an employer-drafted contract that prohibited employees from joining certain labor unions as a condition of employment.[177]

The turning point in the struggle to enact legislation was 1928, when a subcommittee composed of Senators Norris, Blaine, and Walsh—all early advocates of workers' rights—consulted attorneys and economists in crafting a new bill.[178] Its rough form would become the NLGA.[179] While consideration of the bill stalled for a while, lacking momentum, President Hoover's attempts to appoint Parker and other conservative judges to higher courts added fuel to the fire. With an election around the corner in 1932, and growing concern mounting about the failures of the federal government in the wake of

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174 BERNSTEIN, *supra* note 173, at 406–09. Parker, a southern Republican, had handed down the well-known *Red Jacket* decision as a circuit judge, enjoining 40,000 workers from breaking their contracts of employment. *Id.*; *see also* United Mine Workers v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839 (4th Cir. 1927). The backlash against him was so strong that Hoover was almost pressured to withdraw the nomination. Hoover refused, and the Senate rejected Parker by a vote of forty-one to thirty-nine. BERNSTEIN, *supra* note 173, at 409. It was the first time the Senate had rejected a nominee in nearly four decades. *Id.*

175 The AFL tried repeatedly to get Congress to enact legislation on labor injunctions. Witte, *supra* note 131, at 348–51. Labor also organized "monster demonstrations to protest against the issuance" of injunctions—protests about procedure itself. *Id.* at 353.

176 As labor historian Irving Bernstein recounts: "All [the man's] limbs and his collarbone had been broken, his spinal cord had been injured, his head had been twisted out of shape, and the exposed areas of his skin had been seared black. This man told [Senator Norris] of the hardships of the miners—the poverty, the company stores, the assault upon the union." BERNSTEIN, *supra* note 173, at 393.

177 *Id. See generally* Daniel Ernst, *The Yellow-Dog Contract and Liberal Reform, 1917–1932*, 30 LAB. HIST. 251 (1989) (exploring the rise and fall of the yellow-dog contract).

178 *Limiting Scope of Injunctions in Labor Disputes: Hearings Before a Subcomm. of the S. Comm. on the Judiciary*, 70th Cong. (1928).

179 Witte, *supra* note 170, at 638–45 (noting both the importance of the 1928 draft and the doubts at the time that it would pass).

the Depression to address the issues facing both workers and the unemployed, the time was becoming ripe for change.

B. The Senate and House Reports

As the Senate hearings on the bill took shape, the election of 1932 was heating up. The AFL made both the NLGA bill and the Parker appointment key election issues.[180] At the same time, anti-injunction acts were being passed in New York (under then-governor Franklin D. Roosevelt, who had secured the Democratic Party's nomination for the presidency) and Wisconsin.[181] Ohio and Pennsylvania had placed restrictions on yellow-dog contracts.[182] As momentum built for the bill, President Hoover nominated Judge James H. Wilkerson, who was known for his broad labor injunctions, for the United States Court of Appeals for the Seventh Circuit.[183] The labor movement and Senate Judiciary Committee raised so much havoc that Hoover withdrew the nomination.[184] Days later, the Judiciary Committee reported the bill out by a vote of eleven to five.[185]

The Senate Report laid out the theory of the NLGA. It began with a broad critique of the procedures used by some federal courts: "That there have been abuses of judicial power in granting injunctions in labor disputes is hardly open to discussion. The use of the injunction in such disputes has been growing by leaps and bounds."[186] The Report stressed the problems created by lack of uniformity in equity procedure, noting that "in the last 40 years there has developed in the American courts the practice of writing a special law to fit the individual case by judges in issuing labor injunctions."[187] It referred to this practice as "tyrannical procedure," which had brought the "[f]ederal courts into disrepute" and "violat[ed] . . . sacred rights of human liberty and freedom."[188]

The Report not only referenced the problems of publicity and aggregation, but also framed the problems under the umbrella of the

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180 *See supra* notes 174–75 and accompanying text.

181 Act of Apr. 9, 1930, ch. 378, 1930 N.Y. Laws 379; Act of May 31, 1929, ch. 123, Wis. Sess. Laws 149.

182 Act of May 2, 1931, No. 108, 1931 Ohio Laws 562; Act of June 23, 1931, No. 311, 1931 Pa. Laws 926.

183 BERNSTEIN, *supra* note 173, at 411–12; *see also id.* at 211–12 (discussing Wilkerson's controversial injunctions, including "issuing a restraining order which, for the dazzling number and variety of prohibited acts, can only be described as majestic").

184 *Id.* at 412.

185 *Id.*

186 S. REP. NO. 72-163, at 8 (1932).

187 *Id.* at 18.

188 *Id.*

problem of economic power in a political economy analysis. Procedure affected substance in a damaging way: At a time when economic conditions made worker association necessary, courts were thwarting the exercise of those rights.[189] The Report noted that "large employers of labor possess unprecedented power to dictate contracts and conditions of employment" that had been aided by "governmental grants of authority" and that enabled those employers "to combine hundreds of millions of dollars of capital and, in this way, substantially to control and sometimes to monopolize opportunities for employment."[190] The Report argued that this economic power, "unrestrained by the organization of labor, would permit employers arbitrarily to fix the wages and conditions of labor under which millions of men and women would find their only opportunity to earn a living."[191]

Thus the Senate Report focused on problems of economic power disparities well understood by the institutional economists advising congressional leaders.[192] The Report continued that the "single laborer" facing this situation and "compelled to labor for the support of himself and family, is absolutely helpless to negotiate or to exert any influence over the fixing of his wages or the hours and conditions of his labor."[193] Without the bargaining power to challenge corporations, workers were forced into "involuntary servitude."[194] The Report therefore framed freedom of contract in terms of vastly unequal power and bargaining leverage.

The Report also stressed that the procedures of federal courts had thwarted the efforts of workers to organize. The Report first discussed and critiqued the lack of notice and opportunity to be heard, summarizing the inability of workers to make their claims in open court, take testimony, or cross-examine witnesses. It also discussed the effect of these procedures on citizens: "Before [a defendant] is given an opportunity to be heard, he is enjoined, and in most cases he is restrained from doing acts and things which seriously interfere with, and sometimes completely deny, his fundamental right of liberty of action, which belongs to every free citizen."[195] The Report noted with

189 *Id.* at 15 (noting that "under modern conditions," workers' unions are "absolutely necessary to protect [workers'] liberty" and observing how courts prevented such unionization by upholding yellow-dog contracts).

190 *Id.* at 9.

191 *Id.*

192 *See* Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 NEB. L. REV. 6, 12 (2014); Frankfurter & Greene, *supra* note 79, at 1–3.

193 S. REP. NO. 72-163, at 9.

194 *Id.*

195 *Id.* at 8.

concern the extent to which injunctions hindered organizing. For example, labor unions, which provide funds to pay benefits to their members on strike, were often prohibited by courts from paying these funds during strikes.[196] The injunctions also often forced employees from company housing and prohibited attorneys from giving advice to employees trying to hold possession of their houses.[197] The Report continued:

> Why the judges of the United States, by extending the extraordinary remedy of the injunction, should prohibit laboring men from litigating in State courts, under the law of the State, to sustain what they claim to be their rights, is almost beyond human comprehension. In truth, such a summary method of depriving persons of their "day in court" has never been held to be "due process of law" in any other class of cases.[198]

The scope of the injunctive remedy as it bore upon associational capacity—a core concern for the progressive and ABA reformers—was also at issue. The Report referenced injunctions that prohibited all speech surrounding a strike.[199] It went on to say that the workers could not seek the advice of counsel and could not speak to friends or family; instead, their "mouths were absolutely closed" and if they "violated this severe decree they would be liable for contempt of court, which means that they would be tried for an offense made illegal by the judge—an offense consisting of an act which would be perfectly lawful under the laws of the State where the controversy existed."[200]

C. Debate

The Senate debated the NLGA for a week in February of 1932.[201] An unusual dynamic emerged: As Senators presented evidence about the procedures underlying labor injunctions, little opposition arose. Senators Norris, Wagner, Walsh, and Blaine gave eloquent speeches

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196 *Id.* at 16.

197 *Id.*

198 *Id.* at 17.

199 *Id.* (describing an injunction which barred defendants from "tell[ing] anyone that a strike was in progress" or "giv[ing] any publicity in any way to the fact that a strike existed").

200 *Id.* The House Report, which in many ways mimicked the Senate Report, was also critical of court decisions that restricted the intended protections for collective action in Section 20 of the Clayton Act, noting that the Supreme Court's cases interpreting the Act found that forms of worker association that were intended to be protected were able to be enjoined. H.R. REP. NO. 72-669, at 10–11 (1932).

201 *See* BERNSTEIN, *supra* note 173, at 412–13.

that essentially rehashed and sometimes quoted directly from the Senate Report.[202]

Senator Walsh focused on how "abuses have crept into the procedure of the issuance of injunctions."[203] He began with procedural issues relating to publicity and moved towards their effect on aggregation:

> The particular abuses . . . are, first, the issuance of restraining orders without any notice whatever; second, the issuance of temporary injunctions . . . upon ex parte affidavits; third, the use of general language in the restraining order, so that the ordinary person to whom it may be directed, or who may be interested in it, is unable to say whether or not a particular act falls within the condemnation of the order . . . and, finally, the issuance of injunctions restraining the doing of acts clearly legal in themselves.[204]

Senator Norris focused on the scope of injunctions and their effect on association.[205] And Senator Blaine spoke of overly expansive injunctions, published in multiple languages and enjoining entire communities, and about how plaintiffs intentionally chose to file complaints before particular federal judges because of the procedures those judges employed.[206]

Senator Felix Hebert of Rhode Island led what little opposition there was.[207] He objected in principle to the practices that were taking place—such was the tenor of debate—but attempted to offer a series of amendments to give the courts leeway still.[208] All were defeated swiftly.[209]

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202 *E.g.*, 75 CONG. REC. 4769–70 (1932) (statement of Sen. Norris); 75 CONG. REC. 4690–93 (1932) (statement of Sen. Walsh); 75 CONG. REC. 4623–26 (1932) (statement of Sen. Blaine).

203 75 CONG. REC. 4689 (1932) (statement of Sen. Walsh).

204 *Id.* Senator Walsh then went on to discuss a labor injunction issued by Judge Wilkerson in which there was neither notice, nor a hearing, nor a clear statement of the particular persons to whom the injunction referred. *Id.* at 4693. He highlighted the "peaceful lines" on which the enjoined behavior took place. *Id.*

205 75 CONG. REC. 4769–70 (1932) (statement of Sen. Norris) (referring to an injunction so broad that a barber was arrested for criminal contempt after hanging a sign in his shop that read: "No scabs wanted here").

206 75 CONG. REC. 4624–25 (1932) (statement of Sen. Blaine).

207 BERNSTEIN, *supra* note 165, at 412 (describing the opposition as "defeatist, divided, and incompetent").

208 75 CONG. REC. 4679–89 (1932) (statement of Sen. Hebert).

209 BERNSTEIN, *supra* note 173, at 412 (noting that Hebert's "crippling" amendments were rejected by "large majorities"). The only significant disagreement—between Senators Walsh and Norris—was over whether courts could issue injunctions enjoining "threats and intimidation." 75 CONG. REC. 4774–80 (1932). Senator Norris stressed how courts had interpreted "threats and intimidation" to enjoin many lawful union activities, including peaceful picketing, and argued that the amendment would enable courts to continue issuing these sweeping injunctions. *Id.* at 4775. Norris eventually conceded, after

The debate in the House was much shorter. It took place on March 8th, and few congressmen voiced any opposition.[210] In the House, as in the Senate debate, representatives held out the practices of Judge Wilkerson and other judges as procedurally problematic deviations from the Equity Rules and from the history of equity itself.[211]

D. Passage

The NLGA "define[d] and limit[ed] the jurisdiction of courts" issuing injunctions in labor disputes.[212] The bill laid out the procedures to be followed by federal courts in labor injunction cases. The bill also prohibited yellow-dog contracts from being used as a basis for relief in federal courts,[213] and it is remembered mostly for these provisions.[214] But the NLGA should be understood as affecting a substantial increase of federal control over civil procedure—two years before Congress passed the Enabling Act. It was part and parcel of how the federal government, through procedural state-building, articulated a view of open hearings and procedure attuned to economic context and required federal courts to comply with that view.

At the outset, the statute defined the problem of economic power. The statute focused on the relationship between economic disadvantage and adjudicatory process. It began with economic context. It noted how bargaining disparities had developed "under prevailing economic conditions," where the "individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor," making worker "freedom of association" necessary.[215] It also focused on how concentrations of corporate power, enabled by government authority, had diminished the bargaining power of workers, making it necessary for them to counterbalance that power through aggregation in order to "negotiate the terms and conditions of [their] employment."[216] Under these economic circum-

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persuading Walsh to limit the impact of the amendment to the "persons, association, or organization making the threat." BERNSTEIN, *supra* note 173, at 412–13.

210 For a useful summary, see BERNSTEIN, *supra* note 173, at 413.

211 H.R. REP. NO. 72-669, at 10–11 (1932). LaGuardia and other supporters persuasively echoed arguments made in the Senate Report to push the House toward an overwhelming vote at the end of the day. 75 CONG. REC. 5474–81 (statement of Rep. LaGuardia) (1932).

212 Norris-LaGuardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115 (2012)).

213 *Id.* § 103.

214 *See supra* note 16 and accompanying text (providing examples of scholarship analyzing the NLGA with this focus on its substantive provisions).

215 29 U.S.C. § 102 (2012).

216 *Id.*

stances, Congress was justified in intervening to ensure that the procedures employed in federal courts gave workers full access to adjudicatory process when their association was threatened to be enjoined and in structuring procedure to protect their association.[217] Procedure was entwined, perhaps ineluctably, with economic power.

The demand for publicity was addressed in the procedural protections of the Act. The restrictions on injunctions applied to all federal courts and all cases "involving or growing out of a labor dispute."[218] They included procedural requirements related to notice, the right to be heard, and the breadth of injunctions. The general policy was that no preliminary or permanent injunctions were to be issued before "hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath."[219] Temporary restraining orders without notice and the opportunity to be heard could only be issued by courts when substantial and irreparable injury to property was unavoidable, but even those orders required "testimony under oath"[220] before issuance, and thus could not depend entirely on cookie-cutter affidavits. Still then, a temporary restraining order would "be effective for no longer than five days and . . . become void at the expiration of said five days."[221] In all cases, the court needed to make, reduce to writing, and file findings of fact supporting every prohibition before a restraining order or injunction could be issued.[222]

In terms of the demand for aggregation, the Act's general policy was that no restraining order or injunction was to be issued in violation of workers' "full freedom of association, self-organization, and designation of representatives of [their] own choosing."[223] The Act regulated both the kinds of activity targeted by injunctions and the parties who could be bound—key factors in sustaining worker association. If courts identified unlawful actions, they were only to restrain the individual or organization making the threat or committing the unlawful act, or "actually authorizing or ratifying" the act with knowledge of its unlawfulness.[224] Furthermore, courts could not issue injunctions forbidding a worker from becoming a member of a labor organization or forbidding a person from persuading a worker to join

217 *Id.* (using this economic context to support the bill's "definitions of and limitations upon the jurisdiction and authority" of federal courts).

218 *Id.* § 104.

219 *Id.* § 107.

220 *Id.*

221 *Id.*

222 *Id.*

223 *Id.* § 102.

224 *Id.* § 107.

an organization.[225] The Act also placed greater restrictions on the types of threats that could be enjoined[226] and required that certain kinds of pre-injunction intervention by police be tried and failed before an injunction issued.[227] It also provided police the opportunity to be heard.[228] Finally, the Act included provisions guiding courts in balancing the harms of employees and employers[229] and included clean-hands provisions for plaintiffs seeking relief.[230]

The Act received overwhelming congressional support, passing 75 to 5 in the Senate and 362 to 14 in the House.[231] It affirmed the role of the federal government in both facilitating worker aggregation and in ensuring that civil procedure offered workers a right to be heard before their association was enjoined. It would not be the last word on these issues.

III
THE FEDERAL RULES: 1934 TO 1938

The Federal Rules of Civil Procedure of 1938 were the product of two critical moments in Congress. First, Congress passed the Rules Enabling Act of 1934, providing the Supreme Court with the authority to draft federal rules of civil procedure. Second, after such rules were indeed drafted by an advisory committee and accepted by the Supreme Court, congressional committees deliberated over whether to modify, reject, defer, or accept those rules through legislative silence. Both moments were influenced by, and bear the marks of, the progressive procedural political economy discourse that this Article has traced thus far.

This Part therefore demonstrates how the questions of economic power raised by the labor injunction and addressed by the NLGA also

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225 *Id.* §§ 104–105. In addition, injunctions issued by federal courts were not to forbid striking, calling or aiding strikes, or inducing others to strike without threats, fraud, or violence; nor could they enjoin workers for "[c]easing and refusing to perform any work" or from "[a]ssembling peaceably . . . in promotion of their interests in a labor dispute" or from "[g]iving publicity" to the facts of a labor dispute. *Id.* § 104.

226 *Id.* § 107 (limiting injunctive relief to threats of "substantial and irreparable injury" to property).

227 *Id.*

228 *Id.*

229 *E.g.*, *id.* (requiring courts to ensure that "each item of relief granted" will provide greater relief to the complainant than harm to the defendant); *id.* § 109 (narrowly limiting injunctive relief to the specific acts plead in the complaint and supported by judicial factfindings).

230 *Id.* § 108 ("No restraining order . . . shall be granted to any complainant who has failed to comply with any [related] obligation imposed by law.").

231 BERNSTEIN, *supra* note 165, at 413.

came to influence the Rules.[232] It emphasizes the economic views of the progressive forces behind the Rules forged from these battles over procedural political economy. While not denying the importance of the ABA and other reformers or asserting a singular theory of procedure behind the Rules, I explore how many leaders behind the Rules explicitly focused on economic and structural power imbalances.[233] I also show that when congressional committees considered the draft rules in 1938, they drew on the perspectives first articulated around the NLGA and labor injunction procedure. This connection reflects the worker-focused orientation of those in power and the continuing importance for New Deal leaders of counteracting the economic power of employers with that of workers. Together, these pieces of evidence suggest that a broader narrative attentive to considerations of economic power inheres in the rise of the Rules and, ultimately, aids in understanding their original background purposes.

A. The Path to 1934: Beyond ABA Reformers

Scholars often credit the ABA and its team of reformers with leading the campaign for a regime of federal rules of civil procedure and thereby paving the path to the Enabling Act of 1934. And much credit is due to them. For the ABA, the passage of the Enabling Act was the "conclusion of a campaign, conducted for more than twenty years."[234] Some scholars go so far as to posit that while progressives like Learned Hand and Yale Law Dean Charles Clark supported a regime of federal rules, they were not, for much of the history of the legislative efforts, at the center of the action.[235] Instead, the argument goes, the ABA led the charge, as a group composed of a large number of corporate lawyers who opposed child labor laws and wage and hour legislation—hardly the progressive leaders of the era.[236] And, since there is sparse legislative history around the passage of the Enabling

232 Unlike the NLGA, which targets injunctive disputes involving employers and employees in interstate commerce, the Rules are trans-substantive, providing procedures for civil disputes across substantive areas. While some scholars have questioned the value of trans-substantivity, the principle remains. *See infra* note 429 (collecting sources questioning the value of trans-substantive procedural rules). The Rules are thus the center of the civil procedure regime.

233 This Section develops a point previously made by Judith Resnik and Stephen Subrin, namely that the Rules Enabling Act was passed as New Deal legislation. Resnik, *supra* note 5, at 502–03; Subrin, *supra* note 5, at 1651.

234 Burbank, *supra* note 22, at 1024.

235 *See* PURCELL, *supra* note 150, at 28–31 (noting the support of Learned Hand and Charles Clark, but describing the reform efforts as a campaign of the ABA); Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 389–90 (1935) (emphasizing the dominance of the bar in procedural reforms).

236 PURCELL, *supra* note 150, at 30.

Act in 1934, scholars have instead relied on the previous hearings on the ABA's draft bills as evidence of the underlying logic of the Enabling Act.[237]

But although ABA leaders may have long led the campaign for change, they were not able to get legislation passed. Many versions of the Enabling Act had been introduced since 1912 and there was strong support for passage in the House, but the bill was repeatedly held up by Senate leaders.[238] Senator Walsh, of the Judiciary Committee, was strongly against the bill. He worried that small-town practitioners who had mastered state procedural practice would be at a disadvantage in learning new federal rules.[239] Walsh was rising to power—newly elected President Franklin D. Roosevelt would soon announce his intention to name Walsh Attorney General—along with a new class of progressives, and with focus shifting to the Depression and the pressing set of economic issues it brought, ABA leaders were unable to garner enough attention for procedural reform. Indeed, by 1932 the ABA appeared to have ceased its efforts to pass the bill.[240]

However, shortly after becoming Attorney General, Walsh suffered a heart attack and passed away. FDR instead appointed Homer Cummings, a Democrat from Connecticut and a law reformer who was committed to instituting federal rules.[241] Cummings supported the ABA proposal. And he also convinced FDR to support the bill, in part to signal to the business community, which generally supported the ABA, that the President was willing to be cooperative if they did not interfere with his economic program.[242] The bill, with heavy lob-

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237 *See* Burbank, *supra* note 22, at 1098–101 (suggesting that courts could rely on earlier congressional debates and the "voluminous materials" developed by the ABA for the 1924 draft of the bill in interpreting the 1934 law, given their textual similarities and the stated intent of the sponsors of the 1934 bill to "resuscitat[e]" the 1924 bill).

238 PURCELL, *supra* note 150, at 31–32.

239 *Simplification of Judicial Procedure: Hearings Pursuant to S. Res. 552 Before the Subcomm. of the S. Comm. on the Judiciary*, 64th Cong. 21, 27–28 (1915) (statement of Sen. Walsh); *see* Burbank, *supra* note 22, at 1063 (stating that Walsh "was concerned both that uniform federal procedure would cause inconvenience to the many lawyers who would be unfamiliar with rules different from those applied in their state courts and that a host of interpretive problems would be created by the new system"); *see also* PURCELL, *supra* note 150, at 31 (describing Walsh's concerns); Subrin, *supra* note 22, at 996–98 (same).

240 PURCELL, *supra* note 150, at 32.

241 *Id.*; *see also* Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237 (1996) (reviewing WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995)) (describing Cummings's views and role in the New Deal transformation); Subrin, *supra* note 22, at 969 (describing Cummings as "perfectly typecast" to champion the Enabling Act because of his position in the liberal administration combined with his experience representing large businesses).

242 *See* PURCELL, *supra* note 150, at 32 (discussing how Cummings revived the proposed law with the President's support).

bying on Cummings's part, rapidly progressed through both chambers, and with little discussion, became law in June of 1934 as the Enabling Act.[243]

Cummings was thus an impactful figure who helped to accomplish what the ABA could not accomplish for two decades. Despite this, scholars give little attention to his ideology and view of the federal rules. It would be a mistake to think his view aligned with that of many of the ABA reformers. Homer Cummings, in short, was no William Howard Taft: He was a New Deal progressive acutely attuned to issues of economic power. Unlike some critics, he "acknowledged no doubts" as to the constitutionality of FDR's early aggressive and transformative measures, which generally favored workers and market regulation.[244] Cummings chastised conservative lawyers who asserted "narrow legalism" and "static" goals, and encouraged young lawyers to come to Washington to participate in the transformation of government to confront the problems posed by industrialism.[245]

Significantly, Cummings's view of procedure was deeply shaped by and concerned with the labor injunction. He had railed against "government by injunction" and developed the Democratic Party's response to the labor injunction in its platform at the turn of the century.[246] And he focused on procedural political economy in his writing and speeches. He believed, for example, that uniform rules of civil procedure would play a role in redistributing power to the benefit of the "sometimes forgotten people" in our legal system.[247] And, in the tradition of many progressive theorists, he not only decried old, individualistic ideas of freedom, but argued that governmental processes and procedures could play a role in restoring freedom to workers and economically less-advantaged parties.[248]

Apart from Cummings, there were also significant shifts within Congress that complicate focusing on the ABA's proposed legislation

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243 *Id.*

244 WILLIAM E. LEUCHTENBURG, THE FDR YEARS: ON ROOSEVELT AND HIS LEGACY 57–58 (1995) (describing Cummings's support of FDR's First Hundred Days program).

245 Homer S. Cummings, *Modern Tendencies and the Law*, 19 A.B.A. J. 576, 578 (1933); *see also* Homer S. Cummings, Attorney General of the United States, Address at a Meeting of the American Bar Association (Aug. 31, 1933), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/08-31-1933.pdf.

246 Homer Cummings, Speech Before the Democratic Committee of Connecticut (1901) (on file with the University of Virginia Library) [hereinafter Cummings Papers].

247 Homer Cummings, Speech Before the Federal Bar Council (June 1938) (on file with the University of Virginia Library).

248 Homer Cummings, *Liberty and Law Under the Administration* (on file with the University of Virginia Library).

before 1932.[249] The Enabling Act was passed during an exciting phase of New Deal legislative flurry; it was, as one scholar says, "New Deal legislation."[250] Cummings was aided in passing the Enabling Act by a progressive New Deal Congress, as FDR's election in 1932 brought a significant shift to its composition. The Democrats swept all twelve open Republican seats in the Senate.[251] Republicans lost over 100 seats in the House.[252] Furthermore, progressive Republicans, including George Norris and Robert La Follette, Jr., were wielding increasing power in their party and in Congress generally, as reflected by the passage of progressive legislation such as the NLGA.[253]

These progressive Republican leaders had spent much of the past decade elaborating a relationship between procedure and economic power.[254] They were the political progenitors of the discourse about procedural political economy that had culminated less than two years before in the passage of the NLGA. Senators Norris, Blaine, and Walsh made plain their view that procedure was shaped by economic power and context in their comments during the NLGA debates and their work with Frankfurter and progressive institutional economists when crafting the NLGA.[255] Indeed, the Senate Report of the NLGA is not only about the labor injunction; it also elaborates the general ways in which procedure can magnify the power and sophistication of employers or can facilitate a level playing field for workers.[256] Procedure can become, as the Report put it sharply, "tyrannical procedure" by vesting in the judge the ability to adjudicate claims without giving employees an adequate right to be heard (and backing such adjudica-

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249 For example, Professor Stephen Burbank relied on the 1926 Report of the Senate Judiciary Committee to understand the purposes of the Enabling Act, calling it "the most detailed and informative of all the legislative materials concerning the bill that became the Act." Burbank, *supra* note 22, at 1107. My point is not to deny the 1926 Report's usefulness, but instead to add to the story by showing how changes in Congress may have shifted views of civil procedure. *See* Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 67–68 (2008) (arguing that changes within Congress by 1934 make Burbank's reliance on the 1926 Report misguided).

250 Subrin, *supra* note 5, at 1651.

251 *See* 1 ENCYCLOPEDIA OF U.S. CAMPAIGNS, ELECTIONS, AND ELECTORAL BEHAVIOR xxxiii (Kenneth F. Warren, ed. 2008).

252 *Id.*

253 Norris-LaGuardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115 (2012)).

254 *See, e.g.*, *supra* Part II (describing how efforts to pass the NLGA over the previous ten years had been driven by arguments connecting procedural issues to justice for workers).

255 *See supra* Section II.C (describing the congressional debate over the NLGA).

256 *See supra* notes 189–94 and accompanying text (analyzing these arguments in the Senate Report).

tion with the threat of contempt), or can provide a more open stage for both parties to make their claims.[257] These leaders understood that procedure was a prism through which questions about economic power traveled.

Cummings and the New Deal Congress were connected with a progressive coalition that viewed procedure in terms of economic power and context and saw adjudication as a process not only through which claims were resolved but also through which rights were fleshed out and established. Cummings advised FDR alongside Felix Frankfurter, a progressive civil procedure luminary and a key part of the growing progressive leadership in power.[258] Frankfurter had not only published an authoritative volume on the labor injunction in the days before the New Deal; he had also published (with James Landis) a sweeping book on the federal judicial system as a whole. Frankfurter asserted that "concealed beneath the surface technicalities governing the jurisdiction of the Federal Courts" were "momentous political and economic issues."[259] He was keenly aware of economic power imbalances, seeking to "encourage government regulatory efforts and protect weaker parties from the impositions of the powerful and sophisticated."[260] Frankfurter was to the progressive procedural movement what Taft was to the ABA.

And even progressives like Clark, who focused on procedural simplicity, tied the Enabling Act to purposes beyond individual dispute resolution. He linked federal rules to "meet[ing] newly recognized social needs" and looked at the rules as "instruments of social control of much wider import than merely as determinants of narrow disputes between individual litigants."[261] While his references to "newly recognized social needs" may sound general to the modern ear, in the wake of the Industrial Revolution and Depression, and the middle of a grave constitutional battle over legislation that would meet the social needs of workers, it was more cognizable and specific.

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257 S. REP. NO. 72-163, at 18 (1932).

258 *See* Devins, *supra* note 241, at 246 (noting the influence of both Cummings and Frankfurter on President Roosevelt).

259 FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM vii (1927); *see also* Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 682–84 (1999) (reviewing FRANKFURTER & LANDIS, *supra*) (describing the scholarly and political impact of Frankfurter's work).

260 Purcell, *supra* note 259, at 698.

261 Subrin, *supra* note 5, at 1651 (quoting Clark); *see also* Walker, *supra* note 17, at 1278–79 (focusing on Clark's New Deal commitment to "social reform" through civil procedure).

Cummings was close with Clark professionally and personally, and was the leading force behind his rise to the federal bench.[262]

My goal in recounting the progressive shift in Congress and the commitments of many progressive reformers behind the Enabling Act is not to make an exclusive statement about the values of the Enabling Act. The process of passing the Enabling Act was a political process, inevitably involving and imperfectly reconciling competing ideas. Instead, my aim is to develop the point that reading into the relative legislative silence of 1934 the ABA's view of procedure alone would be misguided. Progressive leaders and congressional actors played significant roles in passing the Enabling Act, and within their network, a distinctive progressive view of procedure had developed that was responsive to economic context and power and played a role in the history of the rise of the Rules.

B. The Path to 1938: The Importance of the Labor Injunction

The NLGA ushered in a federal government that was willing to intervene in market arrangements to ensure that power imbalances were corrected. In the period between 1934 and 1938, when the rules authorized by the Enabling Act were drafted and considered by congressional committees, Congress continued this endeavor. For example, Congress passed the National Labor Relations Act (NLRA), establishing a "right" of workers to bargain collectively, encouraging it, and setting up institutional mechanisms to protect it.[263] The Supreme Court, upholding the law in *NLRB v. Jones & Laughlin Steel Co.*, called collective bargaining a "fundamental right,"[264] leading Edwin Corwin to remark that a constitutional "revolution[ ]" had occurred, where "liberty" was protected not only against government infringement but as "something that may require the positive intervention of government against . . . other forces."[265] With the NLGA and NLRA thus came the rise of the "labor interventionist" state: a federal government rebalancing the scales for workers and taking on positive obligations to ensure their wellbeing.[266] The state continued

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262 *E.g.*, Letter from Homer Cummings to Charles Clark (Nov. 5, 1937) (on file with the University of Virginia Library) (discussing Cummings's successful efforts to convince FDR to nominate Clark for a federal judgeship).

263 National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

264 301 U.S. 1, 33, 43 (1937).

265 Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297, 325 (quoting Edward S. Corwin, *The Court Sees a New Light*, NEW REPUBLIC, Aug. 4, 1934, at 354, 354–55).

266 *Id.*

to tip the scales with the enactment of the Social Security Act,[267] the Fair Labor Standards Act,[268] and the development of the Works Progress Administration,[269] among other innovations.

The Rules would be no different. Congress focused on workers and their ability to litigate in deliberating over the Rules—a fact that should bear upon how the background purposes of the Rules are understood. As the House and Senate committees considered the draft rules in 1938, congressional leaders wanted to be sure that the draft rules would guard rather than weaken the state interventions that had strengthened workers' power. Workers' interests and aims were at the center of congressional deliberations.

Before Congress had its final say on the federal rules, however, the Supreme Court had its chance at design. In June 1935, a year after the Enabling Act was passed, the Supreme Court established an Advisory Committee to design draft federal rules. The committee included law professors, including Charles Clark, who was the Reporter, and practicing lawyers, including William Mitchell, who was the chair.[270] The Advisory Committee completed a draft of the rules for the Supreme Court in May of 1936, with copies distributed to the Court and the public. After comment, the Advisory Committee produced a final draft of the rules, which the Supreme Court accepted.[271] Cummings reported the draft rules to Congress in January of 1938.[272] If Congress did not act, the rules would take effect in September of 1938.

Congressional committees deliberated over the draft rules that spring, and while their deliberations were not as in-depth as those surrounding the NLGA, they were more in-depth than those surrounding the Enabling Act in 1934. Members of the Advisory Committee had predicted—correctly, it turns out—that the labor injunction and right to trial by jury in injunction and contempt cases would be central to

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267 Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.) (distributing benefits to "old-age" persons, dependents, and unemployed persons).

268 Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219) (establishing standards to improve worker conditions, such as minimum wages and maximum work hours).

269 *See Roosevelt Forms 3 Work Divisions*, N.Y. TIMES, May 7, 1935, at L13 (explaining that the Administration would fuel the economy by both providing jobs and by investing in the country's infrastructure).

270 Clark, Dean of Yale Law School at that time, was a "relative late-comer[ ] to the Enabling Act debate." Subrin, *supra* note 25, at 710. Mitchell, though in private practice at the time of the drafting, had formerly been Attorney General. Resnik, *supra* note 5, at 499 n.24.

271 Subrin, *supra* note 25, at 729.

272 *Id.*

the deliberations within Congress.[273] This time, however, the conversations were not about injunctive practices per se or the right to be heard. Instead, reflecting the labor movement's newfound power, congressional leaders focused on whether the federal rules would maintain or interfere with the new procedural and substantive rights that workers had won, and whether the regime was acceptable to labor unions themselves. The focus, that is, was on whether the federal government would still facilitate workers' power.

This time, the House hearings went into more depth. After introductory statements from Cummings, Clark, and Mitchell, the next three speakers represented the ABA, AFL, and International Ladies Garment Workers' Union.[274] Thus, the forces that had been aligned against equity procedure in labor injunctions took top billing. The dialogue focused in large part on labor issues. First, committee members wanted to ensure that the draft rules would not interfere with the ability of labor unions to sue and be sued, a right established by the Court in *Coronado Coal Co. v. United Mine Workers*.[275] That right had taken on new import with the NLGA and NLRA, which gave unions the right to institute proceedings against and enjoin employers who violated workers' rights.[276] The rules, as Mitchell clarified, were meant to "fit exactly the policy" that Congress had established in the NLGA and not to interfere with existing policy generally.[277] Second, unions raised issues about service of process under Rule 4(d)(3),

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[273] *Id.* at 742; *see also* 6 PROCEEDINGS OF MEETING OF ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE OF THE SUPREME COURT OF THE UNITED STATES 1345, 1424 (1936), http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-february-1936-vol-2 (statement of William D. Mitchell, Chairman, Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States) ("There are just two subjects in these rules, although I may be wrong about it, that Congress would be inquisitive about. One is the preservation of jury trial inviolate and the other is the injunction.").

[274] *Rules of Civil Procedure for the District Courts of the United States: Hearing on H.R. 8892 Before the H. Comm. on the Judiciary*, 75th Cong., III (1938) [hereinafter House Hearings].

[275] 268 U.S. 295 (1925); House Hearings, *supra* note 274, at 12–15 (statement of Charles E. Clark, Reporter, Advisory Committee on Rules for Civil Procedure Appointed by the Supreme Court) (discussing the Advisory Committee's intent to preserve *Coronado* by drafting a rule that allowed partnerships and unincorporated associations with no other standing in the jurisdiction to be sued to enforce a substantive right); *id.* at 21–22 (statement of William D. Mitchell) (emphasizing that the Advisory Committee was stating the law established by *Coronado*, not attempting to change it in any particular way).

[276] *See, e.g.*, House Hearings, *supra* note 274, at 42–43 (statement of Joseph A. Padway, Chief Counsel, American Federation of Labor) (explaining that "[w]here at one time we were defendants . . . [in] injunction cases, and took our lickings quite frequently," now with the NLRA and NLGA in place, labor relied upon the injunction to enjoin employers who were violating the NLRA and did not "have . . . the fear that we [had] in the past").

[277] *Id.* at 21 (statement of William D. Mitchell).

fearing that the language of providing service to an "officer" or general "agent" might result in employers serving a representative of the national union or an officer of an affiliated state union chapter[278]—thereby using procedure to disadvantage unions and harkening back to the notice and overbreadth issues that had plagued labor injunctions earlier.[279]

The final issue involved Rule 65(e), which dealt with injunctions. Rule 65 was based on both the NLGA and the Equity Rules. It imported notice and hearing requirements into injunction procedure, required judges to make findings on the public record about irreparable harm, and permitted enjoinment only of specific acts. The NLGA went beyond Rule 65 in small ways, but the two were largely consonant.[280] Rule 65(e) was intended to clarify that it did not displace the NLGA, which would still govern employer-employee disputes. The AFL worried that it might be misconstrued as altering the NLGA. The Rule stated that the NLGA still governed temporary restraining orders and preliminary injunctions in actions between an employer and employee, but the AFL wanted to make it clear that the procedural commands of the NLGA applied to injunctions more generally, including permanent injunctions.[281] Mitchell suggested having the notes to the Rules clarify that neither these issues nor the law under *Coronado* or the NLGA was altered and to clarify the scope of service requirements.[282] He reiterated the utility of including these notes before the Senate, emphasizing that the AFL and Congress of

278 *E.g.*, *id.* at 43–46 (statement of Joseph A. Padway).

279 *See id.* at 42 (describing how overbreadth in labor injunctions had burdened workers); *see also supra* Section 1.B (describing the inadequacies of labor injunction procedure and their attendant harms).

280 For example, under Section 7 of the NLGA, an ex parte temporary restraining order expires after five days. 29 U.S.C. § 107 (2012). Under Rule 65(b)(2), the ex parte temporary restraining is "not to exceed 14 days," unless good cause is shown for extension or the opposing party consents to an extension. FED. R. CIV. P. 65(b)(2). Similarly, there are minor linguistic differences. Under Rule 65(c), surety bonds are conditioned on payment of "costs and damages sustained by any party found to have been wrongfully enjoined or restrained." FED. R. CIV. P. 65(c). Under section 7 of the NLGA, the amount of the bond shall be sufficient "to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such [an] order or injunction." 29 U.S.C. § 107. Courts have treated these provisions as "substantially similar." *See, e.g.*, Static Control Components, Inc. v. Lexmark Int'l, Inc., 869 F. Supp. 2d 800, 804 n.7 (E.D. Ky. 2012) (quoting Aluminum Workers Int'l Union Local 215 v. Consol. Aluminum Corp., 696 F.2d 437, 446 n.4 (6th Cir. 1982)).

281 House Hearings, *supra* note 274, at 49–51 (statement of Joseph A. Padway).

282 *Id.* at 165–66 (statement of William D. Mitchell).

Industrial Organizations (CIO) were comfortable with the approach of clarifying the rules through notes.[283]

The House Report came out in June of 1938. It was four pages long, and primarily focused on labor issues. With regard to the service issues identified by the AFL, it stated that the sponsors had added a note to Rule 4(d)(3) clarifying that service on an affiliated organization was not permitted.[284] It also stated that the sponsors had added a note to Rule 65 clarifying that it was intended to be merely declaratory of the NLGA and did not alter its procedural requirements or the state of the law otherwise.[285] The committees made it clear that the gains that workers had made under the NLGA would be maintained in the new regime. With these changes, both committees recommended that the rules be adopted. On September 16, 1938, through congressional silence, the Rules were adopted.[286]

IV
BACK TO THE PRESENT: CIVIL PROCEDURE AND ECONOMIC POWER

This Part explores how the progressive economic view of civil procedure presented above can aid in understanding the background purposes of the Rules and therefore provide resources to advocates and commentators today as they face concerns about procedural political economy. It also lifts from the legal struggles around the NLGA the concept of countervailing power and explores how the concept and its focus on economic power imbalances provides a useful framework for advocating access to public adjudication and class action. Before employing history and theory to these ends, however, this Part first outlines the problems of economic power that define both the modern political economy and the transformations within civil procedure. This Part thus frames the problems of political economy that characterize federal civil procedure today and explores how the economic history of procedure told above enlarges the sphere of considerations that can be brought to bear in critiquing this political economy.

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283 *Rules of Civil Procedure for the District Courts of the United States: Hearing on S.J. Res. 281 Before the S. Comm. on the Judiciary*, 75th Cong. 10–11, 25 (1938) (statement of William D. Mitchell).

284 H.R. REP. NO. 75-2743, at 2–3 (1938).

285 *Id.*

286 Subrin, *supra* note 25, at 729.

A. Procedural Political Economy

The economic structure of American life has changed in significant ways over the past few decades. Today, the broader economic context is one in which worker and consumer (and, in some instances, even investor) bargaining power are weak on the one side, and corporate power is concentrated and strong on the other. At the same time, since the 1970s corporate actors have pushed procedural reforms that shift the claims and disputes of workers, consumers, and other actors away from public adjudicatory processes and narrow the pathways to and within those processes. This context heightens the concern now, as it did at the origins of modern federal civil procedure, that procedure is cementing existing power imbalances. I describe the present economic context (at a necessarily broad level) in this Section both because doing so aids in understanding these changes in the context of procedural political economy and because important parallels can be drawn between the present economic context and the historical context developed above.

First, consider worker and consumer bargaining power. While the midcentury bargaining strength of American workers and consumers was relatively strong, at least by historical standards within the country, it has diminished in important ways. In the past few decades, worker bargaining power has significantly weakened. While corporate profits and executive pay have risen, "wages have stagnated, with median income falling to where it was 40 years ago."[287] Economists argue that a set of choices that insulate companies from paying taxes and distributing profits to workers, along with lucrative government contracts that distort price mechanisms, have consolidated corporate power, and that traditional routes for citizens to neutralize this power have been diminished.[288]

The most striking example of weak worker bargaining power is the decline of labor unionization levels. Unions provide workers with concentrated and powerful bargaining support, and unionization levels have been dipping deeply since the 1970s and continue dipping yearly.[289] As has been well documented, a series of phenomena—

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[287] Tami Luhby, *The American Dream Is a Myth, Says Nobel Prize Winner*, CNN (Apr. 22, 2015, 4:50 PM), http://money.cnn.com/2015/04/22/news/economy/stiglitz-american-dream/.

[288] *See, e.g.*, STIGLITZ, *supra* note 43, at 52–53, 57, 61–62, 71–74 (outlining ways in which governmental decisionmaking has facilitated the concentration of corporate power).

[289] *See* Heather M. Whitney, *Rethinking the Ban on Employer-Labor Organization Cooperation*, 37 CARDOZO L. REV. 1455, 1457 (2016) ("In 1959, 32.3% of the private sector labor force was unionized. In 2005, only 7.8% of workers in the private sector were. By 2011, that number was down to 6.9%, and in 2014 that number dropped again, to 6.6%."); Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE U. L. REV. 859,

including globalization, the decline of manufacturing and the rise of the service economy, political choices and judicial rulings weakening unions, and political acquiescence to employer preferences for flexibility rather than worker security—have weakened the ties between workers and their employers and the ability of workers to share in the gains of their enterprises.[290] As I explore below, changes to the nature and availability of public adjudication work in tandem with these phenomena to weaken worker power.

At the same time, consumer bargaining power has also fallen, due in part to the rise of contracts of adhesion across a wide swath of mass-produced consumer products and services.[291] Technological advances, such as consumer websites imposing onerous terms on consumers who visit them, have also reduced consumer power.[292] As I survey below, the efforts of corporations and employers to bind consumers and employees to arbitration agreements and the Supreme Court's permissiveness with its arbitration jurisprudence contribute to the decline in consumer bargaining power.[293] In addition, the declining ability of citizens to use the class action mechanism to aggre-

892–93 (2016) ("Union density in the United States has declined to an all-time low."); SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT 214, 257 (2014) (describing the decrease in both unionization rates and successful union elections, resulting in less than 10% union membership).

290 *See, e.g.*, Wilma B. Liebman, *"Regilding the Gilded Age": The Labor Question Reemerges*, 45 STETSON L. REV. 19, 23–24 (2015) (attributing the growing imbalance between worker and corporate power to a number of factors, including growth in foreign trade, deregulation, technological advancement, market globalization, and Wall Street's influence "expand[ing] dramatically" due to the shift from managerial capitalism to financial capitalism, which treats companies as "assets to be bought and sold"). *See generally* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004) (providing a comprehensive overview of the evolution of the American economy and its impact on labor law); DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014) (describing the increasingly "fissured" nature of employment relationships and the negative impact that shift has had on workers).

291 *See, e.g.*, Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 586 (2009) (noting that today "most consumers are not in a position to bargain over the terms on which they purchase ordinary consumer goods"); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1188–89 (1983) (noting that, because "very likely the majority of signed documents are adhesive," courts and scholars have increasingly raised concerns that enforcing these agreements leads to "unjust results"); Batya Goodman, Note, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319, 323–24 (1999) ("Today, the typical agreement consists of a standard printed form prepared by one party in the superior bargaining position and adhered to by the other party, who has little or no opportunity for bargaining.").

292 *See, e.g.*, Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125, 1128–30 (2000) (highlighting the prevalence of corporate-friendly terms in online contracts).

293 *See infra* Section IV.A.2.

gate consumer power and to access discovery and trial to augment it also contributes to declining consumer power.

There has also been a larger shift in economic wealth and corporate power. Income inequality has risen sharply, while wealth has been concentrated in the hands of both corporate actors and a small class of super-wealthy citizens.[294] Corporations have also concentrated control within industries, which decreases the competitive pressures to which they are exposed and raises concerns about their ability to control wages and prices. It also raises general concerns about oligopolistic power, including the ability of concentrated firms to influence income inequality and even potentially convert their economic power into political power.[295] While for some time it appeared that the concentration within industries was waning,[296] recent sources have shown that corporate concentration is at high levels, perhaps even historically high levels.[297] As Joseph Stiglitz explains: "In today's economy, many sectors—telecoms, cable TV, digital branches from social media to internet search, health insurance, pharmaceuticals, agro-business, and many more—cannot be understood through the lens of competi-

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294 *E.g.*, JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 2–4 (2010); STIGLITZ, *supra* note 43, at 2–5; *see also* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 255–60 (Arthur Goldhammer trans., Harvard Univ. Press 2014) (comparing the income and wealth distribution in the United States to that of several European nations); Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 Q.J. ECON. 1, 13 (2003) (finding that in 1970 the top 0.01% income was fifty times the average, and grew to 250 times the average by 1998).

295 *See supra* notes 40–46 and accompanying text.

296 *See* RICHARD C. HUSEMAN & JON P. GOODMAN, LEADING WITH KNOWLEDGE: THE NATURE OF COMPETITION IN THE 21ST CENTURY 29–30 (1999) (describing the decline of large corporations and the rise of small and midsized businesses throughout the twentieth century); PAUL KRUGMAN, PEDDLING PROSPERITY: ECONOMIC SENSE AND NONSENSE IN THE AGE OF DIMINISHED EXPECTATIONS 14 (1994) ("The role of giant corporations in the U.S. economy has been shrinking, not rising, for the past two decades, with the great bulk of job growth among smaller firms.").

297 U.S. COUNCIL OF ECON. ADVISERS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 4 (2016), https://sites.duke.edu/collardwexler/files/2015/01/20160414_cea_competition_issue_brief.pdf; JOHN BELLAMY FOSTER & ROBERT W. MCCHESNEY, THE ENDLESS CRISIS: HOW MONOPOLY-FINANCE CAPITAL PRODUCES STAGNATION AND UPHEAVAL FROM THE U.S.A. TO CHINA 68–72 (2012); *see also* STEPHEN P. DUNN, THE ECONOMICS OF JOHN KENNETH GALBRAITH: INTRODUCTION, PERSUASION, AND REHABILITATION 113 (2011) (noting that large firms constitute 97% of total sales, with the top 900 large firms accounting for 42% of total sales); *Corporate Concentration*, ECONOMIST (Mar. 24, 2016, 2:02 PM), http://www.economist.com/blogs/graphicdetail/2016/03/daily-chart-13 (finding that, between 1997 and 2012, the share of revenues of the top four firms in each industry increased to constitute one-third of all revenue).

tion. In these sectors, what competition exists is oligopolistic, not the 'pure' competition depicted in textbooks."[298]

Corporations have also accumulated political power in part through their increasing ability to fund political processes and to lobby political officials.[299] Recent history has evinced the political strength of corporate power in various ways—including the difficulty in restraining the power of the banking and securities industries and the political inability to tax capital and corporate wealth at the level that middle-class income is taxed[300]—raising concerns about oligarchy.[301]

Civil procedure is importantly linked to this economic structure. In this context of concentrating corporate power and declining worker and consumer power, I survey below two changes that courts and legislatures have introduced within civil procedure that interact with and help to shape and maintain this economic structure, sketching out the contours of these changes and exploring their economic implications for diffuse workers, consumers, and citizens. I thus frame today's procedural political economy before considering how the economic history explored above provides resources for understanding and critiquing it.

1. Class Actions

In the past three decades, the Supreme Court and Congress have imposed barriers to plaintiffs seeking to amalgamate into class form, with negative economic consequences for workers, consumers, and other diffuse economic parties.

The modern class action arose with the 1966 Amendments to Rule 23.[302] As one drafter of the Rule put it, Rule 23 sought to allow

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298 Joseph Stiglitz, *The New Era of Monopoly Is Here*, GUARDIAN (May 13, 2016, 9:15 AM), https://www.theguardian.com/business/2016/may/13/-new-era-monopoly-joseph-stiglitz.

299 Recent Supreme Court First Amendment cases have substantially expanded protections for corporate campaign spending. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1441–42 (2014) (plurality opinion) (holding that an aggregate contribution limit scheme violated the First Amendment); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 736–37 (2011) (holding that a matching funds provision equalizing election funding violated the First Amendment); Citizens United v. FEC, 558 U.S. 310, 319 (2010) (strengthening the Court's protection of corporate free speech).

300 *See generally* STIGLITZ, *supra* note 43 (exploring the interconnectedness between economic inequality and the failure of the political system).

301 *E.g.*, Fishkin & Forbath, *The Anti-Oligarchy Constitution*, *supra* note 46, at 690 ("We all can see that our political economy has changed, and many fear that the changes point toward concentrations of political and economic power that Americans a century ago called oligarchy.").

302 For a history of the revisions, see 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 1751–1753 (3d ed. 2005). Today, Rule 23(a) requires that

"the joinder of related modest-sized claims held by a significant number of people that were economically unviable if obliged to be advanced one by one."[303] In this way, and by generally making class actions more flexible and functional, the Rule was intended make classes "useful for enforcing the public policies embedded in the antitrust, securities, civil rights, and other substantive federal and state laws extant at the time."[304] The class action thus "respond[s] to power asymmetries in civil litigation."[305] Indeed, "[o]ne of the rule drafters' express goals was to facilitate access to courts for those who lacked the resources or the knowledge that they had possibly been harmed."[306] As a foundational article on class action stated: "Modern society seems increasingly to expose [people] to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive."[307]

Since the 1990s, the Supreme Court has read Rule 23 in ways that have "constrained dramatically" class action, "reducing its effectiveness as a means of private enforcement of various public policies."[308] Many of those decisions relate to the rigorousness of the requirements for class certification,[309] the availability of precertification settle-

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all of the following prerequisites be met: numerosity, typicality, commonality, and representativeness. FED. R. CIV. P. 23(a). In addition, one of the 23(b) requirements must be met. FED. R. CIV. P. 23(b).

303 Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 294 (2014).

304 *Id.* at 295. Of course, the benefits and drawbacks of private enforcement can be contrasted with and weighed against those of administrative enforcement. *See, e.g.*, Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1549 (2014) ("Conflict between Congress and the President over control of the bureaucracy is a perennial feature of the American state, and this creates incentives for Congress, seeking an alternative or supplement to bureaucracy, to provide for enforcement via private litigation."). *See generally* Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982) (considering reasons why legislatures may delegate enforcement to administrative agencies rather than relying on private actions); Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretation of Title VII*, 63 VAND. L. REV. 363 (2010) (analyzing the consequences of Congress's decision to rely on private parties rather than the EEOC to enforce Title VII).

305 Resnik, *supra* note 6, at 84.

306 *Id.* at 134.

307 Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941).

308 Miller, *supra* note 303, at 297.

309 *See, e.g.*, Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (holding that a regression model developed by plaintiff's expert could not satisfy the requirement that questions of law or fact common to class members predominated over questions affecting only individual members).

ments,[310] and the scope of punitive damages.[311] Scholars have argued that these changes require a showing beyond what the text or history of Rule 23 requires.[312] For example, in recent years federal courts have added an implicit requirement for classes to be certified, a so-called "ascertainability" requirement that proposed classes be defined with "objective criteria" and that there "be a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition."[313] One scholar has argued that this requirement deviates from the text of Rule 23—which includes no such requirement—and undermines its purposes by, among other things, calling into question the very viability of consumer class actions.[314] The Court's recent holding in *Wal-Mart Stores, Inc. v. Dukes*[315] has been similarly critiqued. In the case, a five-

310 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 838–39, 846 (1999) (rejecting a precertification settlement in asbestos litigation and cabining the availability of "limited fund" class actions pursuant to Rule 23(b)(1)(B) limited fund class); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997) (rejecting precertification settlement in asbestos litigation and requiring district courts to pay "undiluted, even heightened, attention" to all Rule 23 prerequisites apart from trial management considerations when class settlement certification is sought).

311 *See* Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (concluding that punitive damages cannot be used to "punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent"); *see also* Catherine M. Sharkey, *The Future of Classwide Punitive Damages*, 46 U. MICH. J.L. REFORM 1127, 1128 (2013) (exploring how the availability of punitive damages has been affected and diminished by both "the doctrinal restraints that have been imposed on class actions generally . . . [and] the constitutional due process limitations that have been placed on punitive damages").

312 *See, e.g.*, Carrington, *supra* note 4, at 538 (discussing the "subversion of Rule 23(b)(3)"); Steig D. Olson, *"Chipping Away": The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935, 939 (2009) (stating that recent developments make "class certification a more onerous and less efficient process for litigants and the court"); Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 YALE L.J. 2354 (2015) (critiquing ascertainability standards for going beyond the text and purpose of Rule 23). *See generally* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1384–1421 (1995) (discussing case studies in various types of mass tort class actions, including asbestos, silicone gel breast implants, mass disaster, and products liability litigation).

313 Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 355 (3d Cir. 2013); *see also* Carrera v. Bayer Corp., 727 F.3d 300, 308–10 (3d Cir. 2013) (denying certification based on ascertainability requirement); Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012) (emphasizing the plaintiff's burden to demonstrate a clearly ascertainable class); John v. Nat'l Sec. Fire & Cas. Co., 501 F.3d 443, 445 (5th Cir. 2007) (upholding lower court's dismissal for failure to state a claim where ascertainability was not represented in the pleadings); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 45 (2d Cir. 2006) (treating ascertainability as a requirement for class certification); WILLIAM B. RUBENSTEIN, 1 NEWBERG ON CLASS ACTIONS § 3:1 (5th ed. 2011) (noting that "[d]espite the specificity of Rule 23, courts have grafted on to it . . . 'implicit requirements,'" including ascertainability).

314 *See generally* Shaw, *supra* note 312.

315 564 U.S. 338 (2011).

member majority concluded that an alleged common employment discrimination injury across Wal-Mart employees based in part on the company's policies failed to constitute a "question[ ] of law or fact common to the class."[316] In so doing, the Court arguably imposed a "heightened standard of proof at the certification stage that undercut the Court's prior law, which had been read to instruct trial judges not to go deeply into the merits when ruling on certification."[317] This conclusion was shared by at least one drafter of the Rule.[318]

Congress has also played a role in narrowing access to class actions. In 1996, Congress attached a condition to an appropriations bill prohibiting the Legal Services Corporation, a private non-profit corporation established by Congress in 1974 to fund civil legal services for the poor,[319] not only from funding class representation, but from funding any organization engaged in any class representation.[320] Pressured by "establishment defendants"[321] and "corporate and defense bar lobbying,"[322] Congress enacted the Class Action Fairness Act of 2005 (CAFA).[323] The statute removes most large class actions to federal district court, thereby "eliminat[ing] state courts as alternative

316 *Id.* at 349, 359 (quoting FED. R. CIV. P. 23(a)(2)).

317 Resnik, *supra* note 6, at 149; *see also* Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 Nw. U. L. REV. COLLOQUY 34, 38 (2011) (arguing that *Wal-Mart* introduces a requirement that plaintiffs "prove, with significant evidence, that there exists a general policy of discrimination as a condition of class certification"); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 459–61 (2013) (invoking the history of the Federal Rules of Civil Procedure to argue that *Wal-Mart*'s "common question" construction is "illegitima[te]"). *See generally* Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 354–71 (2011) (describing the shift toward evaluating the merits during class certification and its implications).

318 *See* Miller, *supra* note 303, at 298 ("[*Wal-Mart*] demands more than the drafters of Rule 23(a)(2) ever intended be necessary.").

319 Legal Services Corporation Act, 42 U.S.C. § 2996e(d)(5) (2012).

320 Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 504(a)(7), 110 Stat. 1321 (1996); *see also* Elisabeth Jacobs, *Fact Sheet: The Restriction Barring LSC-Funded Lawyers from Bringing Class Actions*, BRENNAN CTR. (Sept. 26, 2003), https://www.brennancenter.org/analysis/fact-sheet-restriction-barring-lsc-funded-lawyers-bringing-class-actions (describing the history and impact of this prohibition). The restriction on LSC funding has "adversely impacted the delivery of legal services to the poor." Joshua D. Blank & Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 PENN ST. L. REV. 1, 4 (2005).

321 Resnik, *supra* note 6, at 145.

322 Miller, *supra* note 303, at 299.

323 Pub. L. 109-2, 119 Stat. 4 (2005) (codified as amended at 28 U.S.C. §§ 1332(d), 1453, 1711–1715, 2074 (2012); *see also* Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1554–57 (2008) (summarizing CAFA's history and provisions).

fora for most class actions."[324] CAFA therefore makes it more difficult for less-resourced citizens to use the class action mechanism.

This is not to say that class actions are perfect mechanisms. Challenges exist in crafting class actions in a manner that is fair to all participants—in, among other things, determining representativeness of class members, adjudicating the wants of those who wish to opt out of certain class actions, and in ensuring that counsel promotes the interests of the class rather than its own financial interests.[325] But despite their imperfections, class actions have unique advantages, among them their capacity to hold corporations accountable for broad, diffuse harms.

Scholars have become concerned about the economic implications of these changes, situating them in a political economy discourse. First, they worry that the benefits or positive goods of class actions may be undermined in ways that harm workers. For example, as I explore in greater detail below, in *Wal-Mart*, the Court potentially rendered most employment discrimination class action litigation under Title VII unviable.[326] This means that diffuse employees subjected to systematic employment discrimination, unlikely or unable to bring claims on their own, may not be able to secure the economic

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[324] Miller, *supra* note 303, at 299.

[325] *See* JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 6, 133–53 (2015) (providing a "warts and all" view of, and ultimate defense of, class action); David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and "Indivisible" Remedies*, 79 GEO. WASH. L. REV. 542, 570 (2011) (considering circumstances under which benefits accrue unevenly to counsel and class representatives); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 418–25 (2000) (considering potential conflicts between class counsel and members); Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 25–28 (1996) (considering issues related to class counsel's self-appointment and notice to plaintiffs); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057 (2002) (examining the case law surrounding opt-out rights and the future preclusive effects of judgments on absent class members); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991) (exploring the regulatory pitfalls in class actions, where plaintiffs' counsel play an entrepreneurial role that raises the prospect of them pursuing their own interests over those of their clients); Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 619–43 (2015) (grounding opt-out rights in the interests of plaintiffs who prefer that their legal claims are not pursued).

[326] *See, e.g.*, John C. Coffee, Jr., *"You Just Can't Get There from Here": A Primer on* Wal-Mart v. Dukes, U.S. L. WK., July 19, 2011, at 52 (arguing that disallowing money damages in Rule 23(b)(2) class actions significantly limits Title VII class actions, because they are unlikely to satisfy Rule 23(b)(3)'s requirements); *see also id.* at 51 ("The simple truth is that employment discrimination litigation cannot normally be certified under Rule 23(b)(3) because of the 'predominance' requirement of that Rule, which requires that the common questions of law and fact 'predominate' over the individual ones.").

relief to which the law entitles them. The overall contraction of class actions means that consumers seeking economic redress for legal harms, employees underpaid or subject to illegal and invidious conduct, and even investors whose rights were violated may lack adequate redress at law.[327] And, in light of the ability of businesses to ban class actions through arbitration clauses, which I explore below, it is possible that "businesses will eventually be able to eliminate virtually all class actions that are brought against them."[328]

Moreover, class actions have long been understood to be part and parcel of how diffuse workers, consumers, investors, and citizens gain and exercise legal power vis-à-vis structurally advantaged corporate actors and bureaucratic governmental bodies,[329] and the decline of the class form diminishes that power. Indeed, one scholar has demonstrated that the restraints on the class form are hitting low-income consumers and employees the hardest.[330] Historically, "aggregating claims has provided significant access to justice" for these groups, counterbalancing knowledge and cost asymmetries and enabling them to combat "abusive practices in the marketplace and the workplace" including "disproportionate instances of predatory lending, consumer fraud, unfair wages, and discrimination."[331] As low-income workers and consumers are unable to aggregate into class form, "whole categories of legal claims are disappearing from the docket—private claims sounding in abusive debt collection, predatory lending, consumer scams, illegal foreclosures, unfair or unpaid wages, and employment discrimination."[332] The end result is that the cabining of class actions

327 *See* Carrington, *supra* note 4, at 544 (predicting that restrictions on class actions will have "substantial" consequences for employees and consumers); Miller, *supra* note 303, at 297 (cautioning that constricting access to class actions will reduce their efficacy as a means of private enforcement, deterrent, and recovery mechanism).

328 Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 163 (2015).

329 *See, e.g.*, Gordon Bonnyman, *Adapting Without Accepting: The Need for a Long-Term Strategy for "Full Service" Representation of the Poor*, 17 YALE L. & POL'Y REV. 435, 437 (1998) (emphasizing the importance of class action as a means for enabling poor communities to vindicate their rights against government and to procure resources); Paul D. Carrington, *Self-Deregulation, the "National Policy" of the Supreme Court*, 3 NEV. L.J. 259, 261–62 (2003) (analyzing the role of litigation and class action in curbing abuses of economic power); Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1535–36 (2016) (exploring why aggregating claims matters to poor and under-served communities as an aspect of gaining economic power and combatting economic abuses); Brett M. Feldman, Comment, *Which Comes First: Class Certification or Jurisdictional Analysis*, 88 TEMP. L. REV. 383, 383 (2016) (exploring how class action is a mechanism for "counter[ing] the considerable legal heft of large corporate entities").

330 Gilles, *supra* note 329.

331 *Id.* at 1535, 1537.

332 *Id.* at 1538.

works to diminish the legal power of those parties who are structurally disadvantaged in the economic order.[333]

2. *Arbitration and Public Adjudication*

The Supreme Court's transformation of its arbitration jurisprudence has similarly led to weakened economic power for diffuse consumers, workers, and citizens attempting to deal with concentrated corporate power.

Arbitration, as part of a larger move towards alternative dispute resolution,[334] is a "phenomenon that pervade[s] virtually every corner of the daily economy."[335] Arbitration mandates are "applied to hun-

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[333] The economic dimensions of the problem can also be expressed through economic theory. There is, as one scholar conceives of it, a market for litigation, in which the number of cases should align with the number of legal wrongs, where the costs of litigating individually and the power disparities that exist would produce too "few" litigations relative to the legal harms committed were it not for the class action mechanism. William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 720–25 (2006). This means, among other things, that diffuse individuals who might pursue a legal claim to correct a wrong and force the wrongdoer to internalize its costs may not do so if sufficient barriers are posed to class actions. I explore other ways in which economic theory is applied to class actions in Section IV.C.1.

[334] *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1073 (1984) (noting the push for increased alternative dispute resolution, including the call for changes in legal training); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459–60 (2004) (citing the shift to alternative dispute resolution as one cause of the 60% decline in the number of trials since the 1980s); Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843 (2004) (studying the growth and impact of alternative dispute resolution in the courts, in the business sector, and in employment and consumer settings).

[335] Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1429 (2008); *see also* Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 880–83 (2008) (assessing the pervasiveness of arbitration clauses in contracts between large companies and consumers). Arbitration has been subjected to public attention recently as well. *See, e.g.*, Michael Corkery & Jessica Silver-Greenberg, *When Scripture Is the Rule of Law*, N.Y. TIMES, Nov. 3, 2015, at A1 (sharing stories of religious arbitration); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking Deck of Justice*, N.Y. TIMES, Nov. 1, 2015, at A1 (describing the prevalence of forced arbitration and detailing ways in which arbitration favors corporations); Jessica Silver-Greenberg & Michael Corkery, *A 'Privatization of the Justice System'*, N.Y. TIMES, Nov. 2, 2015, at A1 (demonstrating how arbitration has "crept into nearly every corner of Americans' lives" and discussing the potential for arbitrators' pro-business biases); Sonia Gill & Amanda Werner, *End Forced Arbitration*, POLITICO (Apr. 26, 2016, 5:28 AM), http://www.politico.com/agenda/story/2016/04/end-forced-arbitration-cfpb-000110 (arguing against forced arbitration and noting some steps agencies are taking to rein in the abuses). The judiciary has also spoken out, most prominently a retired judge who served briefly as an arbitrator. *See* Richard Neely, *Arbitration and the Godless Bloodsuckers*, W. VA. LAW., Sept.–Oct. 2006, at 12, 13 ("In arbitration the professional litigants have an enormous advantage not

dreds of millions of consumers and employees, obliged to arbitrate not because of choice but because public laws have constructed requirements to use private decision making in lieu of adjudication."[336] Arbitration is presumed to be a creature of contract,[337] but there are few opportunities for meetings of minds in most contracts requiring arbitration in the modern economy.[338] These are contracts of adhesion.[339] Arbitration clauses are pervasive in employment contracts and across a variety of consumer contracts.[340] According to one study, three-quarters of consumer transactions are subject to arbitration.[341] According to another, over 90% of the largest telecommunications, credit, and financial services companies have arbitration clauses in their employment contracts.[342]

Arbitration is done in private, without the gaze of the public, and without the need for the adjudicator to give reasons to the public for

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only because they write the contract designed to stick it to the consumer, but also because they know the arbitrators who will enforce any and all illegal and/or unconscionable provisions in their contracts.").

336 Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2808 (2015).

337 *See id.* at 2806 (describing it as such).

338 *See e.g.*, OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 185 (2012) (stating that cellular carriers draft their contracts in response to consumer mistakes and misperceptions); Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ON ARB. & MEDIATION 56, 64 (2014) ("When Buyer signs the form or otherwise manifests assent to it, Buyer might not read the arbitration clause, let alone understand it and reflect on it, much less discuss it with counsel or negotiate it with Seller."). *See generally* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2012) (analyzing and questioning the "alternative legal universes" of boilerplate contracts).

339 *See* Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893 (9th Cir. 2002) (concluding that a contract was "procedurally unconscionable because it is a contract of adhesion: a standard-form contract, drafted by the party with superior bargaining power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely"); Resnik, *supra* note 6, at 128–30 (discussing how contracts of adhesion differ from traditional contracts); *see also* Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 138, 140 (1970) (stating that a contract requires "not only a deal, but dealing" that "lessen[s] the possibility of monolithic one-sidedness").

340 *See, e.g.*, Katherine V.W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. REV. DISCOURSE 164, 167–68 (2013) (discussing surveys showing how arbitration clauses appear in phone service, cable, and credit cards contracts, and even medical consent forms).

341 ZACHARY GIMA ET AL., FORCED ARBITRATION: UNFAIR AND EVERYWHERE 1 (2009), http://www.citizen.org/documents/UnfairAndEverywhere.pdf.

342 Eisenberg et al., *supra* note 335, at 886. As early as 2003, approximately 25% of private sector employees not covered by collective bargaining agreements were required to enter into arbitration as a commitment of employment. *See* Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 410 (2007) (finding that 22.7% of nonunion employees in a survey of telecommunications companies were subject to arbitration).

its decisions.[343] Complaints and settlement materials are often kept private as well.[344] Arbitration clauses shield the public from knowing what activities are challenged, why they are alleged to require legal remedy, and what reasons are given for their remedy or lack thereof. Similarly, arbitration agreements increasingly deny opportunities for aggregation, as a growing proportion of arbitration clauses ban class actions within arbitral fora. The majority of "credit card companies, banks, telecommunication companies, and other large service providers" ban class actions in arbitration.[345] In the employment context, courts have split on whether class bans in arbitration interfere with workers' rights to engage in "concerted activities" under the National Labor Relations Act.[346] The NLRB and a few courts have found that bans on class arbitration interfere with those rights,[347] while others have disagreed.[348]

Arbitration is regulated by the Federal Arbitration Act of 1925 (FAA).[349] The FAA states a general policy of enforcing arbitration

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[343] *See* Wilko v. Swan, 346 U.S. 427, 436 (1953) (noting that arbitrators may reach decisions "without explanation of their reasons and without a complete record of their proceedings"); Resnik, *supra* note 336, at 2811, 2862–63 (discussing the various ways in which arbitral proceedings and decisions remain private); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 223 (1995) ("While an arbitrator might, at some level, be governed by law, the arbitration itself [is] not a process obliged to enforce federal law.").

[344] *See* Resnik, *supra* note 6, at 124 (discussing how the public docket of cases is incomplete because it depends on arbitrators forwarding information).

[345] Stone, *supra* note 340, at 169; Katherine V.W. Stone, *Signing Away Our Rights*, AM. PROSPECT (Mar. 5, 2011), http://prospect.org/article/signing-away-our-rights-0.

[346] National Labor Relations Act § 7, 29 U.S.C. § 157 (2012); *see also* Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 843–50 (1989) (exploring the meaning and history of Section 7).

[347] Herrington v. Waterstone Mortg. Corp., No. 11-CV-779-BBC, 2012 WL 1242318, at *6 (W.D. Wis. Mar. 16, 2012); Owen v. Bristol Care, Inc., No. 11-04258-CV-FJG, 2012 WL 1192005, at *4 (W.D. Mo. Feb. 28, 2012), *rev'd* 702 F.3d 1050 (8th Cir. 2013); *In re* D.R. Horton, Inc., 357 N.L.R.B. 2277 (2012), *aff'd in part, rev'd in part sub nom.* D.R. Horton, Inc., v. NLRB (5th Cir. 2013); *see also* Raniere v. Citigroup Inc., 827 F. Supp. 2d 294, 314 (S.D.N.Y. 2011), *rev'd* 533 Fed. Appx. 11 (2d Cir. 2013) (holding that waivers to proceed collectively under the Fair Labor Standards Act are unenforceable).

[348] *See* Tenet HealthSystem Phila., Inc. v. Rooney, No. 12-MC-58, 2012 WL 3550496, at *4 (E.D. Pa. Aug. 17, 2012) (upholding an arbitrator's decision to discount the NLRB's analysis); Morvant v. P.F. Chang's China Bistro, Inc., 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012) (upholding arbitration agreements in employee contracts); LaVoice v. UBS Fin. Servs., Inc., No. 11-Civ-2308(BSJ)(JLC), 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012) (declining to find a guaranteed right to collective action which cannot be waived in non-negotiated arbitration agreements). This issue is now pending before the Supreme Court. Epic Sys. Corp. v. Lewis, 137 S. Ct. 809 (2017), *granting cert. to* 823 F.3d 1147 (7th Cir. 2016).

[349] Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2012)).

provisions in contracts governing transactions in interstate commerce, subject to "such grounds as exist at law or in equity for the revocation of any contract" and excludes "workers engaged in foreign or interstate commerce."[350] For several decades, the Supreme Court interpreted the statute to have narrow purposes and maintained a system of judicial supervision of arbitration. For instance, in *Wilko v. Swan*,[351] the Court refused to apply an arbitration clause to a dispute over whether a brokerage firm violated the Securities Act of 1933, concluding that the clause interfered with the Securities Act's purposes.[352] The Securities Act "was drafted with an eye to the disadvantages under which buyers [of securities] labor," and the arbitration clause would only exacerbate those disadvantages because arbitral awards "may be made without explanation of their reasons and without a complete record of their proceedings" and deprive the plaintiff of understanding or challenging "arbitrators' conception of the legal meaning of [the] statutory requirements."[353] In light of these circumstances, the Court demanded public adjudication. The Court during this period focused on the potential interaction of arbitration with the vindication of statutory rights and on how the positions of the parties influenced arbitration's effects. During several years following *Wilko*, the subjects of judicial analysis included "the quality of consent, the impact of the costs of arbitration, and the allocation of authority between arbitrator and judge about contract interpretation."[354]

This began to change in the 1980s, and in 1989, *Wilko* was explicitly overruled.[355] The Court no longer concerned itself with disparities in bargaining power, or reasoned about how arbitration could by its very nature weaken the entitlements that flowed from public adjudication or statutory law.[356] For example, in *Mitsubishi Motors Corp. v.*

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350 9 U.S.C. §§ 1, 2.

351 346 U.S. 427 (1953).

352 *Id.* at 435–38.

353 *Id.* at 435–36.

354 Resnik, *supra* note 6, at 118. Resnik notes that the Supreme Court over this period declined to require arbitration in four instances. *Id.* at 115 & n.208 (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973); U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971); Moseley v. Elec. & Missile Facilities, Inc., 374 U.S. 167 (1963); *Wilko*, 346 U.S. 427).

355 Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485 (1989).

356 *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991) ("Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."); *Rodriguez*, 490 U.S. at 481 (rejecting the *Wilko* Court's "suspicion of arbitration" as weakening substantive legal protections and instead endorsing statutes favoring alternative dispute resolution); *see also* Bruhl, *supra* note 335, at 1426–32 (describing the evolution of the Court's case law with regard to statutory rights enforcement); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1636–38 (2005) (same).

Soler Chrysler-Plymouth, Inc.,[357] the Court signaled that federal statutory claims were generally not excluded from arbitration, eschewing its former concern that power imbalances and arbitral privacy could by their very nature make arbitration less suitable for fulfilling important public policies.[358] The Court asserted that it would no longer "presum[e] that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators."[359] Arbitration was no longer thought to in some cases generally and by its very nature risk interfering with "the substantive rights afforded by [a] statute," but merely entailed "resolution in an arbitral, rather than a judicial, forum."[360] Plaintiffs now needed to show that an "inherent conflict" existed between vindicating a statutory right and arbitrating, or that Congress otherwise intended to preclude waiver of a judicial forum.[361]

Two recent Supreme Court decisions, *AT&T Mobility LLC v. Concepcion*[362] and *American Express v. Italian Colors Restaurant*,[363] have shifted the doctrine even further in favor of arbitration. In *AT&T Mobility*, the Court upheld a consumer contract banning both class actions and class arbitration against a challenge that the waiver was unconscionable under California law.[364] The Supreme Court concluded that the California law was preempted because it interfered with the FAA, which had instituted a "liberal federal policy favoring arbitration."[365] The Court also praised arbitration for its "efficient, streamlined procedures" and its capacity to reduce costs and increase the speed of dispute resolution.[366]

In *Italian Colors*, the Court upheld an arbitration clause despite the fact that doing so all but guaranteed that no viable claim could be brought under the statute in question.[367] A family restaurant argued that American Express had violated the Sherman Antitrust Act, and

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357 473 U.S. 614 (1985).

358 *See id.* at 625 (rejecting a presumption against the arbitration of statutory rights).

359 *Id.* at 634.

360 *Id.* at 628.

361 Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987); *see also* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000) (stating that the Court must ask "whether Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue").

362 563 U.S. 333 (2011).

363 133 S. Ct. 2304 (2013).

364 *See AT&T Mobility*, 563 U.S. at 352 (holding that California's *Discover Bank* rule is preempted).

365 *Id.* at 339 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

366 *Id.* at 344–45.

367 *See Italian Colors*, 133 S. Ct. at 2310 (declining to invalidate the arbitration agreement at issue).

challenged an arbitration clause that both required arbitration and prohibited class arbitration.[368] The restaurant argued that the cost of individual arbitration would not only be too high but also may be higher than any potential recovery for the individual plaintiff.[369] The Court upheld the arbitration clause, concluding that the FAA did not permit it to invalidate a contractual waiver of arbitration even if the plaintiff's cost of individually arbitrating would exceed potential recovery.[370] Justice Kagan's dissent, joined by two other justices, noted the perverse effect of the Court's ruling.[371] The cost of individually arbitrating for the restaurant would be such that doing so would be a "fool's errand."[372] As such, "if the arbitration clause is enforceable, [American Express] has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse."[373]

The shift in the Court's jurisprudence from *Wilko* to *Italian Colors* was significant. The Court had gone from rejecting "the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims" and being explicitly concerned about power imbalances,[374] to finding that the FAA embodies a "liberal federal policy in favor of arbitration" based on its cost and time savings.[375] The result is a sweeping transformation of adjudication.

From a procedural political economy perspective, the result is a transformation of procedure that weakens the power of structurally disadvantaged parties in the economic system. As one scholar puts it, these cases deny aggregation power to "countless consumers, employees, investors, and small businesses that lack any real bargaining ability and are left subject to adhesive no-class arbitration clauses relating to a wide range of basic transactions and societal amenities."[376] In this way, they weaken the ability of diffuse workers

368 *Id.* at 2308.

369 *See id.* (noting an economist's declaration that proving the claims could cost up to millions of dollars, while maximum recovery would be $12,850 per individual).

370 *See id.* at 2310 (rejecting the argument that courts should invalidate class arbitration waivers when plaintiffs would have no economic incentive to bring claims individually).

371 *Id.* at 2313 (Kagan, J., dissenting).

372 *Id.*

373 *Id.*

374 *See* Resnik, *supra* note 6, at 117 (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985)).

375 *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)); *see also* Resnik, *supra* note 6, at 112–18 (fleshing out the Court's transition in more detail).

376 Miller, *supra* note 303, at 300.

and consumers to exercise meaningful forms of power through adjudication.

Thus, citizens' abilities to enforce antitrust, consumer protection, and employment laws "are threatened," as public adjudication is being "displaced in many contexts by powerful business entities employing take-it-or-leave-it contracts containing mandatory arbitration clauses in contexts in which concepts of bargain, consent, and volition are wholly illusory."[377] These cases thereby "exhibit a preference for the purportedly equal and fair market agreements . . . disfavoring efforts to rebalance the terms of economic power between consumers and large companies through [public adjudication]."[378] In this way, they "systematically favor[ ] the interests of corporations over consumers."[379] For workers, mandatory arbitration may also suppress wages. One researcher found that arbitration provisions governing employees provide employers with increased bargaining control to suppress wages and corporations with more control generally over workplace governance.[380] Furthermore, were the Supreme Court to follow some U.S. district and circuit courts and find that contracts banning class arbitration for employees do not violate the collective action provisions of the NLRA, this result would further diminish employee power.[381]

The concern that individual consumers and workers will not do well in arbitration against companies is borne out by the most recent, and perhaps most rigorous, empirical study of arbitration. Analyzing nearly five thousand cases filed by consumers before the American Arbitration Association, researchers David Horton and Andrea Chandrasekher came to three conclusions.[382] First, the weakening of consumer class actions has led plaintiffs' lawyers to bring more indi-

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377 *Id.* at 301; *see also id.* at 300 ("[J]udicial determinations involving significant federal and state policies are being eschewed in favor of a hypothesized national policy favoring arbitration, supposedly emanating from a 1925 statute designed for intercorporate disputes that never was intended to apply to the types of transactions involved in *Concepcion* and *Italian Colors*.").

378 K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1334 (2016).

379 *Id.*

380 *See* Alexander J.S. Colvin, *Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 79–90 (2014) (explaining how mandatory arbitration decreases employee bargaining power).

381 *See supra* notes 346–48 and accompanying text (discussing the split among courts on this issue); *see also* Stone, *supra* note 340, at 173–77 (arguing that such bans violate the NLRA).

382 David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 63 (2015).

vidual cases before arbitral fora.[383] Second, consumers lose more often than they win in those fora, even though predictively this should not be the case.[384] And, third, "high-level" and "super" repeat players such as "elite corporations" win even more.[385] The researchers conclude that the Supreme Court's case law has both "shield[ed] big companies from class action liability," and by shifting public claims—including class ones—to individual claims within arbitration, has "allow[ed] them to dominate [those] individual cases as well."[386]

The changes to arbitration have taken place within a larger decline of access to public adjudication.[387] Consider, for example, pleading standards. In two recent decisions, the Supreme Court heightened pleading standards at the motion to dismiss stage.[388] In *Bell Atlantic Corp. v. Twombly* in 2007[389] and *Ashcroft v. Iqbal* in 2009,[390] the Supreme Court moved away from the notice pleading standard that had prevailed in civil matters, according to which a plaintiff needed to give the defendant fair notice of the claim and the legal grounds on which it stood.[391] Under the notice pleading standard, a "short and plain statement of the claim showing that the

383 *Id.* at 63, 99.

384 *See id.* at 63, 99–101 (finding a consumer win rate of 35%).

385 *Id.* at 63, 102–14.

386 *Id.* at 63.

387 *See generally* Burbank & Farhang, *supra* note 304 (chronicling the rise and fall of the litigation state); Miller, *supra* note 3 (asking whether an aggrieved person can still secure a meaningful day in court); Resnik, *supra* note 336, at 2874–93 (discussing the Court's arbitration doctrine).

388 Scholars have also argued that the Supreme Court has made summary judgment more easily available to defendants in ways that deviate from the text and purposes of Rule 56, which denies litigants access to trial when the court determines that there is "no genuine issue as to any material fact" such as to preclude "judgment as a matter of law." FED. R. CIV. P. 56; *see* Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 645–47 (2010) (arguing that a series of Supreme Court decisions allowed district courts to render summary judgments more frequently than Rule 56's text seemed to allow); Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After* Celotex, 40 HASTINGS L.J. 53, 83 (1988) (same); D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 35 (1988) (asserting that the Supreme Court's jurisprudence makes Rule 56 pro-defendant). However, one study found that the frequency of successful summary judgment motions did not increase in light of these changes. Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 862 (2007).

389 550 U.S. 544 (2007).

390 556 U.S. 662 (2009).

391 Notice pleading was the standard under the Supreme Court's decision in *Conley v. Gibson*. 355 U.S. 41, 47 (1957) ("The . . . Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. . . . [A]ll [that] the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is . . . ." (footnote omitted)).

pleader is entitled to relief" would suffice to allow a plaintiff to move past the pleading stage and access discovery.[392] But the Court has since instituted a plausibility standard under which the plaintiff needs to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[393] *Twombly* and *Iqbal* require "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action"[394] and demand "enough facts to state a claim to relief that is plausible on its face."[395] Most commentators have concluded that the cases "represent a major departure from the Court's established pleading jurisprudence."[396]

Though only *Twombly* involved consumers challenging corporate actors, these changes to pleading standards were pushed for by the "powerful drumbeat of . . . the business community."[397] Scholars have argued that they "mark[ ] a continued retreat from the principles of citizen access [to courts], private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth."[398] While the defense bar and members of the business community favor heightened pleading standards, asserting they are "necessary to reduce the cost of litigation, weed out abusive lawsuits, and protect American business interests,"[399] others, including civil rights, consumer, and labor groups, disagree. They argue that raising pleading standards will quash "meritorious claims before discovery, undermine various state and national policies, and increase the burden on under-resourced plaintiffs who typically contest with industrial and governmental Goliaths in cases in which critical information is largely in the hands of defendants and is unobtainable without access to discovery."[400]

Scholars are also concerned that heightened pleading standards will hit plaintiffs in civil rights and employment discrimination cases the hardest. This is so because it is difficult to plausibly plead "motivation, state of mind, and insidious practices" when they are hidden by

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392 FED. R. CIV. P. 8(a)(2). *See generally* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1215–1221 (3d ed. 2004) (providing background information and case citations pertaining to Rule 8(a)(2)).

393 *Iqbal*, 556 U.S. at 678.

394 *Twombly*, 550 U.S. at 555.

395 *Id.* at 570.

396 Miller, *supra* note 3, at 15–16 & n.52 (collecting references).

397 *Id.* at 9.

398 *Id.* at 10.

399 *Id.* at 16.

400 *Id.*

employers or "buried deep within an entity's records."[401] Under the notice pleading standard, the claims of such plaintiffs were theoretically more likely to survive a motion for dismissal, giving plaintiffs access to discovery materials that might shed light on the practices of defendants. In this way, a notice pleading standard allows economically less-resourced parties to bring into public light facets of economic governance that they believe violate public norms.

The Supreme Court has not yet decided whether the plausibility standard applies to employment discrimination cases, but several federal circuit courts have concluded that it does, and scholars have predicted that these holdings will harm employees challenging the conduct of their employers because employment discrimination actions are difficult to prove before discovery.[402] As one scholar argues: "It is uncertain how plaintiffs with potentially meritorious claims are expected to plead with factual sufficiency without the benefit of some discovery, especially when they are limited in terms of time or money, or have no access to important information that often is in the possession of the defendant . . . ."[403] The result is that these pleading standards may disproportionately disadvantage indigent plaintiffs.[404]

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401 *Id.* at 45–46; *see also* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules"*, 2009 WIS. L. REV. 535, 561 ("Perhaps the most troublesome possible consequence of *Twombly* is that it will deny court access to those who, although they have meritorious claims, cannot satisfy its requirements either because they lack the resources to engage in extensive prefiling investigation or because of informational asymmetries.").

402 *See, e.g.*, Miller, *supra* note 3, at 42–43 & n.163 (citing cases and noting that claims of employment discrimination and hostile work environment claims, among others, "are the very cases that should be given greater pleading latitude"). The notice pleading standard had been reaffirmed in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). However, it has been rejected by courts after *Iqbal* and *Twombly*. *See, e.g.*, Francis v. Giacomelli, 588 F.3d 186, 192 n.1 (4th Cir. 2009) ("The standard that the plaintiffs quoted from *Swierkiewicz* . . . was explicitly overruled in *Twombly*."); Guirguis v. Movers Specialty Servs., Inc., 346 F. App'x 774, 776–77 n.7 (3d Cir. 2009); Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009).

403 Miller, *supra* note 3, at 43.

404 *See id.* at 66–67 (discussing the high litigation costs for plaintiffs). Changes to access to discovery and heightened pleading standards elsewhere have produced similar effects and can be subjected to similar critiques. Particular heightened pleading standards have shielded corporate defendants accused of securities violations. For example, the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. (2012)), requires plaintiffs making securities claims to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2) (2012); *see also* Miller, *supra* note 3, at 9–12 (describing the business community lobbying for the heightened standard). And access to discovery has been limited, diminishing the ability of plaintiffs to access often important information. *See* Carrington, *supra* note 4, at 539; Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 7 (2004); Miller, *supra* note 303, at 323–24 (discussing the burdens of

In light of these changes, the following claim can generally be made about procedural political economy today. It traces the three norms that were followed throughout the history of the labor injunction and rise of the Rules: In (1) a new context of increasing corporate concentration of power and steadily decreasing worker and consumer bargaining power across various parts of the economy, procedural innovations have been introduced that (2) enact barriers to disenfranchise the economically less-advantaged from public adjudicatory procedures and (3) thwart their efforts to aggregate power—here, through the class form—to vindicate rights. The problem of economic power and its procedural translation through issues of publicity and aggregation have therefore returned in a new form.

While there are parallels to history, these similarities need not be overstressed; nor should differences between the eras be overlooked. Thus, to take one example among many, today no one doubts that workers have the right to form unions, even if workers in actuality struggle to do so and unionization levels are at relatively low levels historically. At the same time, as I summarize below, low worker and consumer bargaining power and rising corporate concentration levels have produced parallel economic problems and anxieties, which unite the past and present. I turn below to analyzing how the historical resources that this Article has developed and the conceptual resource that emanates from that history are useful for characterizing the economic nature of the problems posed by these procedural changes and for critiquing the changes.

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discovery); Miller, *supra* note 3, at 45 (describing information asymmetries); *see also* FED. R. CIV. P. 16, 26. For a summary of discovery limitations, see generally ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY, EDUCATION AND TRAINING SERIES (1984).

Furthermore, a set of rulings on access to counsel in civil cases drastically limits the ability of economically weaker parties to secure counsel. *See* Turner v. Rogers, 564 U.S. 431, 448 (2011) ("We consequently hold that the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)."); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–32 (1981) (holding that there is no right to counsel for parents in facing potential termination of parental rights in every case). *But see also* Boddie v. Connecticut, 401 U.S. 371, 382–83 (1971) (holding that indigents seeking dissolution of marriage cannot be barred from courts because of inability to pay court fees). There is a renewed movement for a "Civil Gideon" to ensure access to counsel for under-resourced civil litigants. *See, e.g.*, Jonathan Lippman, Address at Law Day 2010: Law in the 21st Century: Enduring Traditions, Emerging Challenges 2–7 (May 3, 2010), https://www.nycourts.gov/whatsnew/pdf/Law%20Day%20/2010.pdf. All of these changes demonstrate a "failing faith" in public adjudication: removing claims from dockets before trial and limiting the ability of economically weaker parties to procure counsel and access the judicial system in the first place. Resnik, *supra* note 5, at 529–30.

B. Background Purposes

The labor injunction struggles sparked a discourse about procedural political economy that shaped the economic foundations of American federal civil procedure. The economic history of the Rules is one in which reformers intended for them to be sensitive to distributions of economic power, and scholars today can return to and employ those background purposes to strengthen their normative claims that modern changes deviate from hard-fought, fundamental procedural commitments. Of course, the Rules have changed since 1938, as the Rules Enabling Act intended.[405] And some of the modern procedural issues—such as those involving multidistrict litigation[406] and class actions—correspond to changes post-dating the 1938 Rules. My intention here is not to deny the dynamism of procedural rulemaking or to argue that the purposes of rulemakers in 1938 somehow trump modern purposes. But these foundational struggles strengthen claims about the enduring commitment, only recently disrupted, of American federal civil procedure to accessible and robust public adjudication and clarify the economic power-based dimensions of that commitment. The history both illuminates the economic purposes baked into the regime of federal civil procedure at an important and foundational moment—as diverse legal and political actors, including Taft, Frankfurter, Clark, and Senator Norris, among many others, recognized the way that civil procedure interacted with distributions of economic power—and strengthens calls for sensitivity to procedural political economy concerns. I thus focus in the following subsections on how these historical resources can inform economic power-based critiques of the decline of public adjudication and the rise of arbitration in its current form.[407]

1. Arbitration

As I discussed above,[408] the Supreme Court has shifted its arbitration jurisprudence in the past few decades, although the FAA itself has not changed. The Court went from explicitly considering and reasoning about power imbalances between the parties that may bear upon the ability of the weaker party to choose arbitration or to vindicate statutory rights to finding a "liberal federal policy favoring arbi-

405 28 U.S.C. §§ 2072–2074 (2012) (describing the process for amending the Rules).

406 *See* Miller, *supra* note 305, at 309 (describing the increase in MDL litigation since 1968).

407 Because modern class actions are a product of the 1966 revisions to the Rules, the normative resources are more useful for reasoning through recent changes to class actions, and I turn to doing so in the next Section.

408 *See supra* Section IV.A.2.

tration" based on its efficiency and time and cost savings.[409] The fact that the FAA has not changed makes this shift puzzling. Several justices and scholars have commented that the Court has "expanded the reach and scope" of the FAA,[410] and indeed has "buil[t] . . . case by case[ ] an edifice of its own creation."[411] To the extent that the FAA's narrow purposes in 1925 for covering intercorporate disputes have been expanded to cover contracts of adhesion covering millions of workers and consumers based on arbitration's informality and cost and time savings,[412] the resources developed here suggest why the Court's shift in its jurisprudence may be problematic.

The Court's reading of policy preferences in favor of arbitration atop the statute, seemingly detached from a reading of the text, conflicts with the background purposes that this Article has developed. The *Wilko*-era jurisprudence, by focusing in part on how power imbalances are relevant variables for favoring public adjudicatory process over arbitration, syncs with the concerns of the procedural reformers explored above about (1) the relationship between civil procedure and economic power imbalances and (2) the role of public adjudication—and open hearings—in ensuring that procedure does not become a tool of the economically more powerful party. The Court today allows the economically stronger party—which crafts contracts of adhesion—to remove disputes from public adjudicatory fora, in part because it reasons that adjudication is expensive, time-consuming, and formal. But the history shows why public adjudication—even if all of those things—may be worthwhile and worth defending for *other* economic reasons.

This is where the focus on publicity's economic dimensions becomes useful. Time and resources may be saved by arbitrating, but the history of the labor injunction shows that the process may also sap consumers, workers, investors, and other diffuse citizens of a form of publicity that is part and parcel of their economic power. Their

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409 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

410 *See, e.g.*, EEOC v. Waffle House, Inc., 534 U.S. 279, 314 (2002) (Thomas, J., dissenting) (arguing that the Court had "expanded the reach and scope of the FAA" absent "any indication that Congress intended such a result"); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 43 (1991) (Stevens, J., dissenting) (arguing that the Court has "effectively rewritten" the FAA (internal quotation and citations omitted)).

411 Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

412 *See AT&T Mobility*, 563 U.S. at 362 (Breyer, J., dissenting) (stating that the FAA was intended to apply to disputes involving parties of "roughly equivalent bargaining power"); Paul D. Carrington, *Self-Deregulation: The "National Policy" of the Supreme Court*, 3 NEV. L.J. 259, 266–68 (2002/2003) (making the same argument); Resnik, *supra* note 336, at 2890–92 (same).

inability to bring public claims about, say, antitrust violations, which require a judge to provide public reasons for deciding the case, may affect the distribution of rights and powers between them and therefore shift costs that should be borne by the firm to the consumer, investor, or market generally. Furthermore, even if a consumer, investor, or worker wins in arbitration, the lack of publicity means that other similarly situated parties may not learn that they have a colorable claim.[413] And, sometimes the fact that a consumer, worker, or investor publicly loses can inspire citizens to gather together to change the law and expand the scope of liability, and in so doing, to exercise countervailing power. Publicity in this way aids diffuse parties in aggregating power. The question, then, is not one of costs alone, but instead about the distribution of costs and rights. The economic history of the Rules clarifies the economic power dimensions of these questions.

Thus, while an understanding of the background economic purposes and concerns behind the rise of modern federal civil procedure may not aid in interpreting the FAA, it can clarify the economic basis of the federal government's commitment to public adjudication, and that commitment and the concomitant concern with economic power imbalances can be mobilized to argue against reading policy reasons atop the FAA that shift disputes away from public adjudication. Of course, if the FAA actually expressed a liberal policy in favor of arbitration based on time and cost savings that extended so broadly, then the analysis would be more complicated, since the Rules and the FAA would appear to be motivated by different background economic purposes and views of the market. But the FAA does not express such a policy, and the Court initially was concerned with power imbalances and their economic effects in interpreting it.[414] Furthermore, as Justice Stevens eloquently showed in his dissent in *Circuit City Stores, Inc. v. Adams*,[415] the drafters of the FAA did not intend it to apply to the employment context, precisely because of procedural political economy concerns about diffuse workers being forced to arbitrate with corporate enterprises.[416] A narrow Supreme Court majority found otherwise, and its analysis "[p]lay[ed] ostrich" not only to the economic history of the FAA but also to the questions of political

413 *See supra* notes 343–44 and accompanying text (discussing the private nature of arbitration proceedings).

414 *See supra* notes 351–53 and accompanying text (discussing case law).

415 532 U.S. 105 (2001).

416 *See id.* at 127–28 (Stevens, J., dissenting) (arguing that the legislative history of the FAA makes it clear that it was not intended to apply to individual employee-employer disputes).

economy that infuse the nation's historical commitment to public adjudication.[417] The FAA should thus be understood, in tandem with the Rules, as reflecting the commitments of an era in which courts and legislatures exhibited a deeper understanding of the political economy problems that diffuse economic parties face in dealing with concentrated corporate power.

2. *Public Adjudication*

Within the sphere of public adjudication, courts and legislatures have introduced a series of changes that make it increasingly difficult for private parties to publicly enforce federal laws.[418] While a complete analysis of this shift is beyond the scope of this Article, the Supreme Court's renovation of pleading standards is illustrative. The Supreme Court's analysis in its recent cases on pleading standards skirts issues of political economy and ignores the economic dimensions of publicity.

In its decisions moving from a notice standard to a plausibility standard, the Supreme Court considered the costs to businesses of conducting discovery and litigating as a background norm. The Court, for example, explicitly referenced these economic considerations in *Twombly*—including the cost of litigation and discovery to businesses[419]—as "justification for . . . establishing the plausibility-pleading standard."[420] The Court, however, ignored the costs imposed on diffuse workers and citizens challenging business behavior through litigation. As one scholar puts it: "*Twombly*'s emphasis on the defendant's costs . . . reveals how one-sided the discussions about expense and the expressions of concern have become."[421]

The history explored here can do work in critiquing this one-sided emphasis. Weighing against the Court's protection of business interests and consideration of costs to businesses alone is a history of procedure—spanning from the NLGA through the rise of the Rules—in which leaders were concerned with how procedure would affect the power of diffuse and economically less-advantaged parties challenging corporate power. Procedural reformers expressed sensitivity to the

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417 *See id.* at 128, 131–32 (discussing the history of the FAA and noting that private arbitration was generally disfavored by judges in the 19th century).

418 For a more comprehensive account, see, for example, Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559 (2015) and Burbank & Farhang, *supra* note 304.

419 *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558 (2007) (noting that "discovery can be expensive"); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) (discussing the "heavy costs" of litigation).

420 Miller, *supra* note 3, at 59.

421 *Id.* at 61.

relationship between civil procedure and corporate power that modern Supreme Court majorities at times lack. While not denying that businesses' costs of litigating can be a relevant variable, the history presented here shows that, for many of the leading proponents of the Rules, federal civil procedure was designed to give economically less-advantaged parties the ability to bring claims in open court and was fueled by a concern that denying them the right to do this imposes costs on them and society writ large. These publicity and power considerations were absent in *Iqbal* and *Twombly*'s political economy analysis.

Of course, there are a host of empirical questions about whether heightened pleading standards negatively affect certain classes of litigants and, in particular, less-resourced litigants, which are beyond the scope of this Article.[422] The point is to critique the extent to which the Supreme Court considers one empirical question with a normative bent—the right amount of business litigant costs—and not the other side, and to introduce competing considerations. While businesses may face increased discovery costs under a notice pleading standard, workers and consumers may face the loss of some economic bargaining power through a plausibility standard that increasingly prohibits them from accessing discovery.[423] The Supreme Court's jurisprudence on the costs of litigating to business and to the legal

422 For examples of articles tackling these questions, see Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270 (2012), which found that *Twombly* and *Iqbal* have negatively impacted between fifteen and twenty percent of plaintiffs facing Rule 12(b)(6) motions, Jonah B. Gelbach, *Material Facts in the Debate over* Twombly *and* Iqbal, 68 STAN. L. REV. 369 (2016), which used data concerning defendant-filed summary judgment motions to examine plausibility pleading's effectiveness in filtering out meritless cases and ultimately finding that it is not possible to determine, Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal*'s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603 (2012), which empirically found that courts are more likely to grant 12(b)(6) motions without leave to amend, to entirely dismiss cases by granting 12(b)(6) motions, and that civil rights cases are especially impacted after *Iqbal*, William H. J. Hubbard, *Testing for Change in Procedural Standards, with Application to* Bell Atlantic v. Twombly, 42 J. LEGAL STUD. 35 (2013), which used a methodology that accounts for selection effects to measure the effect of *Twombly* and finding that it created no significant change in dismissal rates, Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015), which found that *Iqbal* has increased dismissal rates, especially for individual rather than institutional plaintiffs, and A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to* Twiqbal *Apologists*, 60 UCLA L. REV. 1710 (2013), which doctrinally and empirically refuted arguments that the shift to plausibility pleading is either inconsequential or beneficial.

423 And, more concretely, they face the cost of not accessing discovery that would reveal a meritorious claim and entitle them to damages. *See supra* notes 400–04 and accompanying text (discussing how insidious practices are often buried within an institution's records and only available through discovery).

system ignores the potential costs to diffuse workers and consumers for whom public adjudication is a mechanism through which they gain and employ economic power—whether it is the power enforce a contract, expose an antitrust or antidiscrimination violation and receive damages, halt predatory or abusive economic practices, or the like.

The larger point, beyond the pleading example, is that the progressive economic history of procedure demonstrates sensitivity to economic power imbalances that the modern Supreme Court at times lacks. And, scholars and advocates focusing on the relationship between civil procedure and economic context and power should understand that there are historical resources in addition to normative ones for taking such a perspective.

C. Countervailing Power

The history of the labor injunction and the NLGA illustrate a conceptual framework for theorizing about procedure. The history not only presents the problem of economic power and the way it was resolved through instituting the demands for publicity and aggregation. As I overviewed in Section I.A and elaborate here, the struggles also provide a set of institutional economic resources for thinking about the nature of the problem of economic power and how it can be channeled through and harnessed by civil procedure.

The crafters of the NLGA were concerned with issues of corporate concentration and bargaining disparities between institutionalized firms and diffuse workers and how these features interacted with procedural rules.[424] They were concerned, in short, with the relationship between procedure and an economic structure that advantaged certain parties. Their procedural solutions of instituting open hearings to magnify the public power of the claims of diffuse parties and structuring procedure to protect association from being enjoined were part of a larger progressive program to "counterbalance" worker power against "the force of concentrated capital" through positive government intervention, or, as Galbraith described it, of facilitating the exercise of countervailing power.[425] Countervailing power provides diffuse citizens with bargaining power, and counters concentrations of corporate power that institutional economists have identified as posing a series of economic problems—from weakening competition and strengthening corporate concentrations of power to even potentially increasing income inequality and the threat of oligarchy.

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[424] *See supra* Part II.

[425] *See supra* notes 56, 63 & 64 and accompanying text.

The three norms referenced throughout—(1) the problem of economic power, which can distort procedural outcomes, and the resulting demands for (2) publicity and (3) aggregation—map onto the concept of countervailing power. They demonstrate how economic empowerment has procedural dimensions. The legal struggles around the labor injunction demonstrated (1) how procedure could *not* facilitate countervailing power, and indeed could undermine it. Workers who were trying to associate to countervail the power of concentrated corporate actors were thwarted by courts issuing injunctions against them based on cookie-cutter affidavits.[426] By issuing injunctions without adequate notice or a right to be heard, procedure was a mechanism through which judges credited the claims of economically powerful parties and denied those who might countervail their power a right to make their claims in open court. Furthermore, had courts provided workers a right to be heard, workers would have had an opportunity to make public arguments about the governance conditions of the firm, why worker association was necessary for workers to assert influence over those conditions, and possibly, to inspire the public to take action when those governance conditions violated public values.

The three norms also show how procedure *can* facilitate countervailing power. Congress showed that, in order to facilitate countervailing power, those designing judicial procedure can (2) provide public fora through which those who would exercise countervailing power can have a right to be heard, which could magnify the public impact of a claim, providing information to diffuse economic parties who might join together to exercise countervailing power. Procedural designers also can (3) facilitate aggregation by, for example, requiring judges to make particularized findings about association, harm, and who precisely threatens it before interfering with association, as the NLGA and Rule 65 require.[427]

As the congressional hearings on the draft Rules in 1938 made clear, open courts that protected association and offered a right to be heard empowered the labor movement, enabling it to move from the defensive to the offensive in the judicial process by using the courts to challenge employers who violated the law.[428] The history shows how the state can facilitate countervailing power through civil procedure that empowers diffuse economic parties by privileging public adjudication and facilitating aggregation. In so doing, procedure can shift power back to workers, consumers, and other economically diffuse

426 *See supra* Section I.B.

427 *See* 29 U.S.C. § 107 (2012); FED. R. CIV. P. 65.

428 *See supra* note 276 and accompanying text.

parties and potentially be part and parcel of the larger basket of legal mechanisms through which the state diminishes problematic corporate concentrations of power.

Countervailing power thus not only extends to private bargains and negotiations between unions and corporate actors, as in the labor law example. Litigation can be part of how economically diffuse parties exercise countervailing power. When those private sphere negotiations fail, litigation is the next step of the struggle for power and indeed is a sphere where economic rights and entitlements are decided.

The concept of state facilitation of countervailing power can be extended beyond the four corners of the NLGA. I develop below how access to class action and public adjudication are two examples of procedural mechanisms that can be used to facilitate countervailing power. If, either to cure bargaining disparities or to diffuse concentrated corporate power, state facilitation of countervailing power is necessary or valuable, that demand can be translated through procedural design and clarify the economic justifications for class actions and public adjudication.[429] I will focus on class actions first and most in exploring how, both because the case is relatively easily made for public adjudication and because modern class actions are a product of the 1966 Amendments to the Rules and therefore post-date the his-

[429] I should note that applying the concept of countervailing power to civil procedure does not necessarily affect its structure. It does not demand different rules for cases involving diffuse workers or consumers and corporate parties than those for other disputes. The American federal procedural system is generally committed to trans-substantive rules, which "offer[ ] uniformity across diverse subject matters and across the country," although the NLGA is an exception to that uniformity insofar as it prescribes slightly different rules for employers and employees in labor disputes. Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 596, 607 (2005). And as scholars have noted, other areas of law deviate from the demand for trans-substantive rules. *See* Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure Part I: The Background*, 44 YALE L.J. 387, 432–35 (1935) (discussing the unification of law and equity procedure); Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure Part II: Pleadings and Parties*, 44 YALE L.J. 1291, 1292–99 (1935) (same); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975) (noting that while trans-substantive rules are an achievement, there are "demands of particular substantive objectives which cannot be served except through the purposeful shaping, indeed, the manipulation, of process to a case or to an area of law"). Even if the NLGA were not in place, however, federal courts could be governed by a trans-substantive set of rules that facilitates access to public adjudication and aggregation through class action through uniform rules applying across disputes. The norms speak to the commitments of the regime, and not its uniformity. They do not demand trans-substantive rules or their abolition. Rules can apply equally to parties across disputes but also facilitate the ease with which economically less-advantaged parties bring public claims and maintain them through trial and facilitate the ease with which parties amalgamate in class form.

tory this Article has told,[430] making the Article's normative framework most useful for thinking through them.

1. *Class Actions*

First, the concept of countervailing power provides economic reasons for the state to facilitate aggregation in litigation. Aggregation of diffuse interests is key to countervailing power theory; the insight of the theory is that corporate interests are strong and consolidated, and workers and consumers are diffuse and do not as easily collectively pursue shared interests. The theory, however, is not only one focused on the collective action problems involved in allowing plaintiffs to effectively enforce federal laws, as are many theories justifying class action. Instead, it begins with economic power disparities that precede litigation but may leak into it and pose harmful effects if not cured by facilitating the aggregation of diffuse economic parties.[431] Because adjudication is a sphere where questions of economic power distribution are at times resolved, the demand for aggregation can in this way justify state design and protection of procedural forms such as class actions that allow "numerous" and diffuse parties to make claims about acts of corporate power that might not otherwise be made under conditions of individual-firm bargaining or dispute resolution. Class action is a state-sanctioned mechanism for aggregating the power of less-advantaged economic parties and making public claims that countervail corporate power.

This point usefully supplements the existing literature on class actions. Scholars often make claims in favor of class actions based on (1) power or resource disparities or (2) collective action problems, focused largely on litigation as a mechanism of statutory enforcement. Scholars focused on power and resource disparities argue, for example, that aggregate litigation enforces statutory rights that otherwise would not be enforced because individual litigation is too costly

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[430] *See generally* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967) (discussing the changes wrought by the 1966 Amendments). For histories of collective litigation and the rise of class actions, see Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43, 48–56 (1989); Stephen C. Yeazell, *From Group Litigation to Class Action: Part I: The Industrialization of Group Litigation*, 27 UCLA L. REV. 514 (1980); Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 868–96 (1977).

[431] These problems include unchallenged corporate concentrations of power that have a series of negative consequences, potentially increase income inequality, and raise the specter of oligarchy. *See supra* Section I.A.1 (discussing corporate concentration and oligarchy).

relative to the amounts at stake.[432] These "negative-value" accounts depend on the existence of a democratic defect: a right exists but enforcement problems stand in the way of its vindication. In addition to cost concerns, scholars also focus on the complexity of modern litigation and information asymmetries to make the argument that class litigation evens out these structural disparities.[433]

Theorists have also focused on collective action or coordination problems, arguing that class actions overcome free-rider problems that would impede individual efforts to enforce federal laws through litigation.[434] Class action can overcome these problems and promote cost-internalization and reduce externalities, "produc[ing] external benefits for society."[435] By ensuring that claims that would not otherwise be brought are brought, class actions also change the behavior of parties beyond the initial suit, potentially reducing future litigation costs, and preserving judicial resources.[436] Class actions thus have beneficial deterrence effects.

The concept of countervailing power complements these accounts and adds another dimension. First, and most basically, to the extent that theories of class action tie it to economic power disparities, the larger economic history of the rise of the Rules and the example in the NLGA of state facilitation of countervailing power situate those concerns in a deeper history of procedure concerned with economic power disparities. In this way, an economic linkage can be made from 1938 to the rise of the modern class action in 1966.

Second, and more importantly, the concept of countervailing power aids in expanding the concern with economic power disparities beyond litigation that serves *statutory* enforcement purposes and situates the class form in a broader, more systemic distribution of economic power between diffuse economic actors and concentrated

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[432] Carrington, *supra* note 4, at 540; Miller, *supra* note 303, at 294; *see also* Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (stating that class actions "provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all").

[433] *E.g.*, Kalven & Rosenfield, *supra* note 307, at 687–88.

[434] *E.g.*, Joseph A. Grundfest & Michael A. Perino, *The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation*, 38 ARIZ. L. REV. 559, 563 (1996); Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 70 (2003); Macey & Miller, *supra* note 325, at 8.

[435] Rubenstein, *supra* note 333, at 710. Under this account, there is a "market for litigation," and absent the class mechanism, the market "produce[s] too few, not too many, transactions" relative to the costs imposed by actors. *Id.* at 723.

[436] *Id.* at 725. Scholars also reason about the problematic agency costs involved in class actions brought by entrepreneurial counsel whose interests may diverge from those of their clients. *E.g.*, John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882–83 (1987); Macey & Miller, *supra* note 325, at 7–8.

corporate actors within the legal structure of corporate capitalism. Class actions are a mechanism for diffuse, structurally disadvantaged workers and consumers to establish their rights and countervail corporate powers. Third, and relatedly, by situating class action in state facilitation of countervailing power, this account points to a larger pool of potential consequences resulting from weakened class actions beyond lower levels of statutory enforcement and cost-internalization. The consequences are the typical negative economic consequences associated with the diminishment of countervailing power, including weak worker and consumer bargaining power and strengthened corporate concentrations of power, which may even shift the political economy towards oligarchic conditions.[437]

This is not to say that the structural problems related to economic power imbalances and private enforcement of statutory laws are analytically separate. They are linked. Theorizing about class actions through the prism of countervailing power reorients attention to the structural power disparities immanent in modern corporate and managerial capitalism and (1) places a purposive foundation beneath the laws that protect workers, consumers, and other diffuse economic parties and (2) clarifies why aggregation in procedural form is important to vindicating the rights contained within those laws to the extent that they rely on private citizens to enforce them through litigation.

Thus, an account of class action drawing from the concept of countervailing power begins not with a claim that cannot be resolved individually but with a structural, systemic economic problem that precedes litigation. The problem is that economic power is distributed unevenly: concentrated within firms and diffusely spread among workers, consumers, and other economic parties. Institutionalization is posed against diffusion, with resulting economic asymmetries. As Part I showed, from the bargaining imbalances and uncompetitive concentrations of power permeating the market, institutional economists and congressional leaders of the progressive and New Deal eras identified problematic effects and reasoned toward a need for diffuse workers and consumers to counter concentrated power. The need for counterbalancing matters not just for private negotiation, as it is traditionally conceived of in countervailing power theory; it also matters for litigation, which is part of how governance disputes are resolved and rights are adjudicated. And within litigation as a site of power distribution and rights clarification, the ability to aggregate into classes matters for diffuse economic actors.

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437 *See supra* Section I.A.

Class actions can thus be tied to a theory of economic power that justifies the aggregation of diffuse parties, and that demand can be extended from private power disputes into public adjudicatory processes. Such economic power considerations justify and undergird both statutory protections substantively and the shape of private enforcement procedurally.[438] In turn, the weakening of class actions as a mechanism for aggregating worker and consumer power may contribute to the weakening of countervailing power in the economy.

2. *Arbitration and Public Adjudication*

Similarly, the focus of the concept of countervailing power on the aggregate power of consumers and workers also provides an economic reason to value *public* adjudication. Publicity is tied to the ability of diffuse parties to amass power. Public hearings allow even individual claims to translate to a broad audience, out of which citizen association may form to pressure corporate change or legislative response. Privatization through arbitration, even if it serves individual dispute resolution, may quash the kinds of consumer and worker association that correct those power imbalances by removing the claims that may spark aggregation from the public sphere. Publicity is in this way a handmaiden of countervailing power.

Public *adjudication* also frequently forces a decision-maker to articulate reasons about how the state views the power dispute between the parties, and therefore potentially allows citizen power to

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[438] The public rights and entitlements scattered across workplace, anti-discrimination, public health, environmental laws, and the like, in part exist to protect numerous and diffuse citizens from forms of concentrated power—both corporate and state—that they would be ineffective in challenging alone. While corporate concentration theory most directly supports those laws dealing with the price and wage mechanisms, bargaining theories easily extend further. Hale, for example, also viewed the state to be justified in enacting—as it ultimately did—antidiscrimination laws because the "private" exercise of discriminatory power had been enabled by state advantaging of and protecting of corporate actors. FRIED, *supra* note 29, at 87–88. More generally, for Hale, the private power to make the decisions that the laws referenced above concern, simply, is ineluctably public and flows from government grants of power, and so public intervention to shape the economic sphere is merely a shifting of power from "unofficial minorities" to the public. *See* Robert L. Hale, *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451, 456 (1920). However, one could argue that some of antidiscrimination law is even justified under a concentration theory because paying wages at a lower level on the basis of characteristics like gender and race is part and parcel of the excess of economic power that competition in the classical model was supposed to eliminate, and that countervailing power, in this model, can eliminate. Indeed, Galbraith argued creatively for antidiscrimination laws and environmental laws based on how, among other things, excesses of corporate power over consumption had harmed the environment and structured women's roles in mid-century American economic life, and also developed economic critiques of areas as diverse as discrimination and environmental protection in later work. For a useful summary, see PARKER, *supra* note 57, at 515–16 (2005).

be exercised more forcefully.[439] While democratic theories focus on how public hearings empower the public with information, the focus on procedural political economy removes a layer of generality from the claim. Information serves a particular economic purpose. Monitoring the exercise of corporate power becomes an essential feature of an economic system that requires such power to be countervailed. The diffuse public's right to watch fulfills an essential economic role in the system.

The state may thus have an interest in protecting public adjudication—even if it has higher costs—because publicity is an element of countervailing power and the state has an interest in facilitating the exercise of countervailing power. Allowing the parties who wield concentrated power to remove dispute resolution from the public sphere undermines the ability of workers, consumers, and citizens generally to wield publicity as an element of countervailing power.[440] And, turning to aggregation, arbitration provisions denying the ability of diffuse parties to aggregate power through class arbitration also diminish their ability to exercise countervailing power. These points are reinforced by at least one study exploring how arbitration provides employers with increased bargaining control and power.[441]

Workers and consumers forced to arbitrate based on contracts of adhesion lose the ability to make open legal claims about corporate behavior that they find to be unlawful. This fact not only stunts their power individually; it also potentially stunts the development of law that hems the excesses of corporate capitalism by removing from public gaze novel issues of statutory or legal interpretation that, if successful, could move the law and put other parties on notice about the kinds of conduct the law prohibits. Privatization stunts this process of legal growth in the name of time and cost savings, even though evidence is mixed about the existence or extent of such savings in arbitration.[442] The Horton and Chandrasekher study regarding parties who

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439 *See* Fiss, *supra* note 8, at 13–14 (exploring the judicial role of public adjudicators who "must . . . justify their decisions").

440 *See supra* notes 343–44 and accompanying text (discussing the private nature of arbitration); *see also* David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 441 (2011) (arguing that the Court has shifted lawmaking power to the private sector).

441 Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71 (2014).

442 *See, e.g.*, Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133, 133–34, 161 (2004) (concluding that "the cost of arbitration is often prohibitively high"); Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91, 112 (2014) (surveying employment discrimination claims and concluding that "courts should reevaluate their permissive attitude toward mandatory arbitration procedures and acknowledge the high costs of this

win and lose in arbitration referenced in Section IV.A.2 also offers reasons to be concerned about the effect of arbitration on countervailing power.[443] Recall that consumers lose more than they win in arbitral fora and that "high-level" and "super" repeat players win even more than other corporate actors, "dominat[ing] individual cases."[444] Citizens are thus generally subject to a process that denies them both publicity and the ability to aggregate power under circumstances inuring to the benefit of large corporate actors. Concentrated power wins; countervailing power loses.

By strengthening the hands of structurally advantaged parties in the name of efficiency, the Court's recent arbitration jurisprudence ignores the losses that may accrue to our economic system—and our democracy—by weakening the position of diffuse workers, consumers, and citizens who would, and must, exercise countervailing power. The rise of American federal civil procedure was aided by an acute understanding of the importance of facilitating the economic power of these parties, and the rise of private arbitration across a sea of economic disputes can only be aided by forgetting those lessons.

CONCLUSION

This Article has unearthed the progressive economic foundations of American federal civil procedure. It has shown how the legal struggles around the procedures of federal district courts issuing labor injunctions motivated Congress to assert increasing control over the procedures of those courts. The labor injunction struggles also engendered a concern among lawyers, law professors, judges, and congressional leaders about the relationship between civil procedure and economic power. That concern continued through the rise of the Rules in 1938 and is essential to understanding their economic purposes. This Article has also embedded these procedural reforms in the federal government's facilitation of countervailing power. It has done so both to reveal the neglected procedural dimensions of economic empowerment at civil procedure's modern foundations and to begin to explore what the concept of countervailing power adds more generally to the field. The resources excavated by this Article help to cast light on the present turns in civil procedure and their troubling economic consequences. Together, the economic history of the rise of fed-

'inexpensive' forum"); Horton & Chandrasekher, *supra* note 382, at 82–83, 101–02 (finding that arbitration costs were higher than reported or predicted).

443 Horton & Chandrasekher, *supra* note 382, at 116–24 (concluding, for example, that small claimants often do not bother to arbitrate disputes and that repeat players have an advantage).

444 *Id.* at 63, 102–16.

eral civil procedure and the concept of countervailing power enlarge the set of reasons that courts and legislatures have to privilege and protect public adjudication and class action and heighten concerns about their decline and the rise of private arbitration.